Proceedings of the Bruges Colloquium

Current Challenges to the Law of Occupation

20th-21th October 2005

Actes du Colloque de Bruges

Les défis contemporains au droit de l'occupation

20-21 octobre 2005

SPECIAL EDITION

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Collegium

Collegium

No. 34, Autumn 2006

SPECIAL EDITION

Discours d'ouverture

Professeur Paul Demaret

Good morning.

On behalf of the College of Europe, I would like to extend my warmest welcome to all of you. Several among you have already come to the College before. However, there are new faces and yesterday evening one of you suggested that I give a brief presentation of the College. Therefore, I am going to do that and then come back to the co-operation between the International Committee of the Red Cross and the College of Europe.

A brief presentation of the College: the College of Europe was the first institute of post-graduated studies, which chose Europe as its subject matter. This was back in 1949, before the setting up of the European Communities. The College was created in the week of The Hague Congress, the Congress of the European movement, in 1948. Leading European figures were among the intellectual founders of the College of Europe namely Salvador de Madariaga, Winston Churchill, Paul-Henri Spaak, de Gaspéry back in 1949. The purpose of the College was, and still is to bring together young graduates who for a full academic year study policy issues from a European perspective. Nevertheless, they also live together for a year in different residencies spread all over Bruges. Therefore, they live, as the first rector Hendrik Brugmans had said, 'together in a kind of European microcosm'.

Today, of course, they are many competing institutes in the field of European affairs. There are programmes of European studies everywhere, in Europe and elsewhere. What we do hope is that the College is seen as the best place where to come to if one wants to get a proper training in European affairs, and not

only study Europe, but also experience Europe at first hand, with its diversity, its complexity but also its growing unity even though the road towards more unity is at times a bit bumpy as you know. However, if you take the long view, as for instance Mr Solana did yesterday at the opening ceremony, I think we should remain optimistic and we should be proud about what Europe has already achieved, particularly with respect of the rule of law, which is now spread, to a large part of Europe.

Today, the College of Europe has two campuses, one located in Bruges since 1949, and which was, as I explained, set up just after the Second World War. Moreover, in the early nineties, just after the fall of communism in Central Europe. another campus was created with the support of the European Union and that of the Polish government. It is a campus, which is located in Natolin, on the yards cards of Warsaw.

Today we have about 380 students, representing, this year, 47 different nationalities in Bruges and Natolin. About 280 students study here at Bruges, and 106, study in Natolin.

What do they study? Respectively, European law, European politics and administration, European economics. Last year we created a new programme dealing with European law and economic analysis. In addition, as I mentioned yesterday in my opening speech, we are going to create a new study programme, which will deal with the EU international and diplomatic relations. We will start that new programme next academic year. In fact, I come from a meeting where we start discussing who we are going to invite to teach. It shows that we are optimistic about the future of Europe and that we hope that the EU will gradually become a more important global actor.

In Poland, in the campus of Natolin, students study European integration from a multidisciplinary perspective during the first term and from a thematic perspective, in the second term. The College faculty now consists of around 150 visiting professors who come from all over Europe and sometimes from overseas. They are now mostly academics, but there is also a significant number who are civil servants coming from European institutions, International institutions or national administrations.

We can also rely now on a network of around 8000 alumni and more than 1000 work in the European institutions, the European Commission, European Council,

the Secretariat, European Parliament, the Court of Justice, and the European Central Bank. There are also alumni working in International organisations. There are between 1000 and 1200 alumni working in the European institutions.

We are also quite proud of the fact that some of our alumni are working in the private sector, but also in academic institutions. There is a growing number of alumni, who teach European affairs in European universities, and there is also a number of our alumni who work for NGOs, However, I would say that the jobs prospects in NGOs are not as widely open as they are in the private sector or in the European institutions or International organisations. However, we are quite proud that a sizable number of former students embrace a career in NGOs.

In the future, we want to continue to deepen our programmes of studies, to widen them. I would like to attract more non-European students to the College, but to do that we need to find more scholarships. We would like to attract more students from so-called neighbouring countries to the East of the present EU, but also to the South. I am referring to North Africa, to the Middle East. I think it would be good for the College, we hope that it would be good for the EU if we could train a bit more of the non-Europeans in European affairs.

Now, coming back to the cooperation with the ICRC, je voudrais dire que le Collège est très fier, très honoré de cette coopération qui existe depuis à peu près 6 ans. La conférence qui s'ouvre maintenant est la 6ème conférence organisée en coopération par le CICR et le Collège. Nous sommes très heureux de cette coopération parce que le droit international humanitaire est quelque chose de très important du point de vue européen. Sa source intellectuelle peut être remontée au XVIII siècle, le Siècle des Lumières. Le besoin d'un DIH a malheureusement été trop prouvé en Europe depuis le XIX siècle et les guerres sanglantes, les guerres civiles diraient certains, qui ont vu les européens s'affronter durement et jusqu'à il y a une cinquantaine d'années. Si on pensait que l'Europe n'avait pas besoin de DIH, les évènements des Balkans ont été là pour rappeler le côté indispensable du DIH. Le Collège est intéressé par cette coopération parce que nous ne sommes pas ici seulement pour traiter des questions de concurrence, de questions de marché intérieur si on pense seulement aux marchandises et aux services. Nous ne sommes pas ici seulement pour traiter de questions économiques pour traiter de questions liées au WTO, nous sommes ici aussi pour promouvoir certaines valeurs européennes fondamentales, et je crois que le DIH est évidemment un produit de ces valeurs.

Nous sommes particulièrement fiers que le CICR ait considéré qu'il valait la peine de revenir au Collège et je voudrais tout particulièrement remercier Yves Sandoz et Sylvie Junod qui sont devenus de grands amis du Collège. Je voudrais les remercier très chaleureusement pour le soutien qu'ils donnent à l'organisation de ces conférences et qui permettent au Collège de les accueillir. Je voudrais également ajouter que la coopération entre le Collège et le CICR va depuis maintenant depuis 3 ans au-delà de l'organisation d'une Conférence internationale en automne. A l'initiative d'Yves Sandoz, nous avons décidé ensemble d'organiser, au printemps, une session de 2 jours et demi ou de 3 jours, qui permette d'introduire les jeunes diplômés ou des étudiants d'université à la problématique du DIH. Ces sessions ont eu pas mal de succès et sont ouvertes non seulement aux étudiants du Collège, mais aussi, avec un succès certain, aux étudiants venant des universités de la région. Et quand je dis "universités de la région", je ne veux pas seulement dire des universités de la Région Flamande dans la petite Belgique. Je ne veux pas seulement dire les universités belges, mais nous avons également ouvert, et fait de la publicité pour cela, auprès d'universités aux Pays-Bas, dans le nord de la France et en Allemagne, dans la partie occidentale de l'Allemagne, la vallée du Rhin, parce qu'il y a évidemment des raisons de transport et de coûts de déplacement. Cette initiative va être répétée pour la troisième fois, et nous espérons qu'elle rencontrera encore plus de succès que précédemment.

Donc, à nouveau merci d'être ici. Merci à tous ceux d'entre vous qui revenez pour la troisième, quatrième, cinquième, parfois sixième fois. Je vous souhaite un grand succès pour vos travaux. Le thème que vous avez choisi est de grande actualité. Puis-je vous faire part, cependant d'une déception : je voudrais être parmi vous, mais des tâches de relations publiques ou administratives me requièrent, et m'empêcheront d'être parmi vous. Cependant dans la mesure où j'ai l'occasion de partager certains repas ou certaines sessions avec vous, comme j'ai pu le faire dans le passé, je me sens toujours rafraîchi et intellectuellement revigoré.

Thank you again for being here. I wish you a very successful Colloquium and I hope to see you again next year, and the year after.

Thank you.

Current Challenges to the Law Of Occupation

Professor Daniel Thürer

I am supposed to provide an overview of the subject of our colloquium, which is "Current Challenges to the law of occupation". This is a timely subject. The International Committee of the Red Cross ("ICRC") has worked in a variety of situations of occupation over the decades. However, recent events have brought the topic to the fore to a much broader audience as well as having highlighted new issues. I believe this is an extremely valuable opportunity for us to share views and experiences. The focus of my intervention will be on legal issues, but in recent years, the ICRC has had to respond to a variety of other challenges raised by situations of occupation, from a more operational angle in terms of issues such as:

- the role of humanitarian organisations in situations of occupation;
- how to interact with the occupying forces in a manner which does not undermine the ICRC's independence, impartiality and neutrality;
- the reality that in some of the situations of occupation where it is active, the security environment has represented a serious challenge, where even humanitarian personnel has become a target.

These are extremely important issues for the institution to address - with important repercussions on the ICRC's activities on the ground, including those to promote respect for humanitarian law and, ultimately, for the persons affected by the armed conflict.

As the programme of the present colloquium shows, the topics raised by occupation are many and go well beyond just international humanitarian law or, indeed, the law itself. I cannot attempt to address even a small part of them. Instead, I propose to present some "real life" questions that the ICRC has recently had to address in relation to its operations in Iraq.

I would like to start with two preliminary points.

First, while I will only be discussing the rules found in instruments of international humanitarian law, they are by no means the only law which apply in situations of occupation. It should not be forgotten that national law continues to apply - subject to certain exceptions which I will discuss later. More controversial, and possibly something which will be addressed in our discussion later, is the question of whether human rights continue to apply in times of occupation. This is the position adopted by the Committee against Torture, the UN Human Rights Committee, as well as, by a number of States.

Secondly, and at risk of stating the obvious, I should recall that the lawfulness of occupation is not regulated by international humanitarian law and does not affect the application of the law of occupation. International humanitarian law is the body of law applicable in times of armed conflict which protects those not or no longer taking a direct part in hostilities and which regulates permissible means and methods of warfare.

International humanitarian law applies in situations which factually amount to an armed conflict. It regulates conduct of hostilities but does not address the lawfulness of resort to force as such. The legality of the use of force is regulated by a different body of rules: the norms of *ius ad bellum*, which today are codified in the UN Charter. The two are quite distinct bodies of law. Once there is armed conflict, international humanitarian law applies equally to all parties to the conflict, regardless of the lawfulness of the resort of force.

The same holds true with regard to occupation. The legality of a particular occupation is regulated by the UN Charter and the rules of *ius ad bellum*. Once a situation exists which factually amounts to an occupation, the law of occupation applies, regardless of the lawfulness of the occupation.[1] In this respect it makes no difference whether an occupation has received Security Council approval; which is its aim; or indeed whether it is labelled an "invasion", a "liberation", an "administration" or an "occupation". The application of the law of occupation is not left to the discretion of the occupying power. As is always the case with international humanitarian law, what matters are the facts on the ground.

1 This was expressly recognised by the US Military Tribunal in the war crimes trials after the Second World War. In the case of *List*, the US Military Tribunal held that:
"International Law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory ... Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject."
US v List, 15 Ann Digest 632 at 647.

Let us now look at some real life examples of these facts on the ground. I would like to raise and discuss the following questions:

1) What factual situations amount to occupation?
2) Who were the occupying powers in Iraq?
3) Which are the rights and duties of the occupying powers?
4) Was 28 June 2004 the end of occupation?
5) Is the transfer of effective control to another authority and consent for the continued presence, the condition for the end of occupation?
6) What about the application of international humanitarian law in Iraq post 28 June 2004?

And I finally try to draw some conclusions.

Let me now raise question No 1:

What factual situations amount to occupation?

The 4th Geneva Convention of 1949 on the Protection of Civilian Persons in Time of War lays down several rules applicable in situations of occupation. However, it does not include a definition of occupation. For this, we must go back to the 1907 Hague Regulations Respecting the Laws and Customs of War on Land which were the first international codification of rules regulating occupation. Article 42 of the Regulations provides that:

Territory is considered to be occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

Common Article 2(2) of the Geneva Conventions adds that the Conventions apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the occupation meets with no armed resistance.

From this we see that there are three relevant criteria:
- an exercise of authority or effective control;
- control over the whole or part of the territory of another state;
- it does not matter whether this occupation was met by armed opposition.

The element - exercise of authority - permits at least two different interpretations.

It could, **first**, be read to mean that a situation of occupation exists whenever a party to a conflict is exercising some level of authority or control over territory belonging to the enemy. So, for example, advancing troops could be considered an occupation, and thus bound by the law of occupation during the invasion phase of hostilities. This is the approach suggested by Jean Pictet in the 1958 "Commentary to the 4th Geneva Convention".

So far as individuals are concerned, the application of the 4th Geneva Convention does not depend upon the existence of a state of occupation within the meaning of the Article 42 referred to above. *The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the [4th Geneva] Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets.* When it withdraws, for example, it cannot take civilians with it, for that would be contrary to Article 49 which prohibits the deportation or forcible transfer of persons from occupied territory. The same thing is true of raids made into enemy territory or on his coasts. The Convention is quite definite on this point: all persons who find themselves in the hands of a Party to the conflict or an Occupying Power of which they are not nationals are protected persons. No loophole is left.

An **alternative, and more restrictive approach**, would be to say that a situation of occupation only exists once a party involved in a conflict is in a position to exercise the level of authority over enemy territory that is necessary to enable it to discharge *all* the obligations imposed by the law of occupation. In other words, the invading power must be in a position to substitute its own authority for that of the government of the territory. This approach is suggested by a number of military manuals. For example the new British Military Manual proposes a two-part test for establishing the existence of occupation:
First, that the former government has been rendered incapable of publicly exercising its authority in that area; and, secondly, that the occupying power is in a position to substitute its own authority for that of the former government.[2]

On the basis of this approach the rules on occupation would not apply during the invasion phase and in battle areas. What is clear, however, is that it is not necessary for a state to control the entirety of another State's territory, for

2 *UK Ministry of Defence*, (note 21), para.11.3, 275.

occupation to exist. It is sufficient for authority to be established over any portion of another state's territory.

Identifying the moment when the law of occupation starts to apply is crucial as it determines which rules of international humanitarian law regulate a situation. Once an occupation begins, [in addition to some general provisions of international humanitarian law - for example, those contained in the chapter on "Provisions common to the territories of the parties to the conflict and to occupied territories" in Articles 27 to 34 of the 4th Geneva Convention -] some special provisions contained in the 4th Geneva Convention must be respected. These rules regulate matters not covered in other parts of international humanitarian law such as the internment of individuals posing a security risk or the transfer or displacement of protected persons out of occupied territory.

The ICRC must determine when a situation amounts to an occupation for very practical reasons: to decide at what stage it should intervene toward a party in a conflict to remind it of its obligations in situations of occupation. How did the ICRC resolve this issue in relation to Iraq? In a pragmatic manner. The aim of the ICRC's interventions is to ensure the protection of invididuals affected by an armed conflict, including occupation, in accordance with the law. In view of this, we adopted the possibly maximalist position that whenever - even during the so called-invasion phase - persons coming within the power or control of a hostile army , should be guarenteed the protection of the 4th Geneva Convention as a minimum. This may be considered a premature qualification of a situation as occupation but the aim of this approach is to maximise protection of affected persons.

This leads me to the next point which I wish to raise with you, namely

Who were the occupying powers in Iraq?

A number of States had troops on the ground in Iraq. Does this mean that they were all occupying powers, with onerous obligations under the Hague Regulations and the 4th Geneva Convention? This too was a question the ICRC had to address to determine to which States it should send a reminder of their obligations under the law of occupation.

The position of the US and UK was clear. According to this point of view, these two States had established the Coalition Provisional Authority ("CPA") which, in

the words of Section 1(1) of CPA Regulation Number 1 of 16 May 2003:
"shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration".
...

The reality on the ground was that the US and the UK have established and are actually exercising authority over the territory of Iraq - in fact even before the CPA had been established. In addition to this reality on the ground, in the preamble to resolution 1483, the Security Council expressly recognised the specific authorities, responsibilities and obligations under applicable international law of these States [the UK and the US] as occupying powers under unified command ("The Authority").

The position of other members of the Coalition that had provided troops was more complicated. The preamble of the same Security Council resolution also noted that other States that are not occupying powers now or in the future may work under the Authority.

This being said, it should be noted that operative paragraph 5 of the resolution, which is the first provision in resolution 1483 to specifically refer to the law of occupation calls upon *all concerned* to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.

This reference to "all concerned" is wider than the language of other provisions in the resolution, which are addressed only to the "Authority". This could indicate that in the Security Council's view it was not just the US and the UK that were occupying powers.

The reference in the preamble to "other States that are not occupying powers" could just have been referring to States which provided support to the Coalition Provisional Authority but whose engagement did not amount to exercising authority over any part of the territory of Iraq.

As I mentioned, the ICRC had to decide which States should be considered occupying powers, in order to send them a reminder of their obligations. While the language of the Security Council Resolution 1483 was an indicator, it was not considered conclusive nor the only one. As always when "qualifying" a situation, the ICRC looked at the reality on the ground. What were the different

contingents actually doing? What did we consider in particular? The focus of the ICRC was on States that had actually provided "combat personnel", to the exclusion of those that had provided experts such as engineers or medical staff - even if such were military.

The ICRC then considered whether the national contingents in question had been assigned responsibility for and were exercising effective control over - and thus occupying - a portion of Iraqi *territory*. All such States were considered occupying powers.

The fact that certain States had only been assigned very small sections of territory and had very few troops on the ground did not, in the ICRC's view, make a difference. Within this territory, troops may be carrying out *functions* for which respect for the law of occupation could be relevant. Examples would include troops carrying out patrols, mobile checkpoints, or arrests and detention of persons protected by the law of occupation. The title given to these troops by their own States - "peacekeeping" or "stabilising" forces - did not affect its determination, which focused instead on the actual functions they were carrying out.

The ICRC took the same pragmatic position as for determining whether a situation amounted to occupation. While, strictly speaking, the armed forces of some of these States were probably not "exercising authority" over territory within the meaning of Article 42 of the Hague Regulations, they could find themselves in a situation where they could be exercising control over protected persons, and in interacting with these persons, would have to respect the laws of occupation. Therefore, in order to maximise the protection of individuals, the ICRC also issued a memorandum to these States recalling their obligations under the law of occupation.

On the basis of this approach, the ICRC sent interventions to the U.S. and the UK and to nine more States. No state objected to the intervention. To avoid any doubts, it should be pointed out and repeated that if the armed forces of any state became involved in hostilities, they would have to respect international humanitarian law, regardless of whether they have been considered an occupying power.

Question 3:

Which are the rights and duties of occupying powers?

Time prevents me from going into the details of the rights and duties of occupying powers. The subject will be dealt with in detail by speakers to come. These rules are clearly laid out in the 1907 Hague Regulations and in the 4th Geneva Convention of 1949, as supplemented by the first additional Protocol thereto of 1977. In their essence they stress that the occupying power must not exercise its authority in order to further its own interests, or to meet the interests of its own population. In no case can it exploit the inhabitants, the resources or other assets of the territory under its control for the benefit of its own territory or population.

Any military occupation is considered temporary in nature; the sovereign title does not pass to the occupant and therefore the occupying powers have to maintain the *status quo*. They should thus respect the existing laws and institutions, and make changes only where necessary to meet their obligations under the law of occupation, to maintain public order and safety, to ensure an orderly government and to maintain their own security.

In the case of Iraq, however, one of the aims of the coalition States was to engage in a transformational process leading to a regime change, creating democratic institutions. In its present form the law of occupation precludes to a large extent such transformations. The law does, however, leave a margin for change in the following areas:

Similar provisions are to be found in Article 43 of the 1907 Hague Regulations, dealing with legislating powers of the occupier, states that the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Article 64 GC IV similarly provides that the penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. ...
The Occupying Power *may ... subject the population of the occupied territory to*

provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

These are instances in which the law of occupation grants an occupying power the possibility to legislate or to effect specific changes. Other exceptions are found in Articles 54 and 66 of the 4th Geneva Convention and, to some extent, in Article 47.

It is worth asking whether occupation law should be changed and be more permissive. Some commentators are inclined to say yes, when the law of occupation is perceived as being in conflict with certain applicable provisions of human rights and with certain policy considerations - e.g. overthrowing an oppressive regime -, which may be claimed to be in the interest of the international community more generally. However, a change of the law of occupation should not be suggested too lightly. One should not neglect the risks that such change may entail. Opening the door too easily could lead to abuse by aggressive armies. The aim of the law of occupation was to prevent the occupying power from modelling the governmental structure of that territory according to its own needs - disregarding the cultural, religious or ethnic background of the society of the occupied territory. An occupying power cannot, by its very nature, be considered a neutral entity acting only in the interest of the occupied territory and its society.[3] This should be borne in mind when suggesting changes to the law.

The most acceptable scenario for effecting changes not foreseen by the law of occupation would be for the UN Security Council to determine expressly in a resolution based on Chapter VII of the UN Charter what kind of transformation should be possible. This would provide the necessary legitimacy to the subsequent steps and could override the rules of international humanitarian law on the basis of Article 103 of the UN Charter. However, rules of international humanitarian law of a ius cogens nature could not be overridden.

3 *Rüdiger Wolfrum*, (note 43), 65.

Let me now, ladies and gentlemen, approach question four which is

Was 28 June 2004 the end of occupation?

Once occupation had commenced in late spring of 2003, for the purposes of international humanitarian law, no significant change occurred until 28 June 2004. Despite the declaration by President George W. Bush of the end of major combat operations on 1 May 2003, the law of international armed conflict continued to apply, including the law of occupation in its entirety.

In view of the intensity of the fighting after 1 May 2003, it was impossible to conclude that the "general close of military operations" referred to in Article 6 (2) and (3) of the 4th Geneva Convention had taken place. Such a general close of military operations would have lead to the end of application of the 4th Geneva Convention, with the exception of a number of provisions, if occupation continued.[4]

In accordance with a timetable agreed upon between the CPA and the Iraqi Governing Council in November 2003, later accompanied by a UN Security Council Resolution 1546 of 8 June 2004 on the political transition of Iraq, steps were taken for the establishment of a sovereign Iraqi government. On 28 June 2004 - two days earlier than foreseen in the UN Security Council Resolution - authority was formally transferred from the Coalition Provisional Authority to the newly established Iraqi Interim Government. The question thus arose as to the legal qualification of the situation after 28 June. Once again, this was very important for practical purposes as the answer determined the applicable law, for example with regard to persons deprived of their liberty.

Ordinarily an occupation ends with the withdrawal of the occupying power. Occasional successes of resistance groups within occupied territories are not sufficient to end an occupation. The law of occupation also continues to apply after the general close of military operations, to the extent that an occupying power continues to exercise the functions of government in a territory.[5]

In the case of Iraq, foreign troops remained in the territory. Did this mean that the law of occupation was still applicable? What was the impact of UN Security Council resolution 1546 adopted on 8 June 2004?

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4 See, however, Article 3(b) Additional Protocol I, which developed the temporal application of the law for situations of occupation.

5 Article 6(3) 4th Geneva Convention; Art. 3 (b) Additional Protocol I.

The continued presence of foreign troops *per se* does not necessarily mean that occupation continues. There have been numerous instances in history where an occupation is declared or widely presumed to have ended, despite the continued presence of the occupying forces. This can happen, for example, if a treaty ending an occupation is accompanied by another one permitting the presence of foreign forces, as was the case for example in Japan in 1952, West Germany in 1955 and East Germany in 1954.

Question 5:

Are the transfer of effective control to another authority and the consent for the continued presence the conditions for the end of occupation?

As of 30 June 2004 - in the words of Security Council Resolution 1546 - the assumption of full responsibility and authority for Iraq lay in the hands of the Interim Government of Iraq. The Coalition Provisional Authority ceased to exist. Thus a transfer of authority from the Coalition Provisional Authority to the Interim Government took place.

Not every transfer of authority to a local government and subsequent expression of consent to the presence of foreign troops, necessarily amounts to the end of occupation. The devolution of governmental authority to a national government must be sufficiently effective. As pointed out in the new British Military Manual, if occupying powers operate indirectly through an existing or newly appointed indigenous government, the law of occupation is likely to continue to apply. The reason for this is evident. Situations must be avoided where the protections to be granted to persons and property under the law of occupation are circumvented. The occupying power cannot discard its obligations by installing a puppet government or by pressuring an existing one to act on its behalf. In all these cases, the occupying power maintains *de facto* - albeit indirectly - full control over the territory. A similar rationale underlies Article 47 of the 4th Geneva Convention, which states that:
protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territory and the Occupying Power ...

The provision is intended to prevent local authorities, under pressure from the occupying power, from making concessions to the detriment of the inhabitants of the territory, impairing their protections and rights.

The validity of an agreement by a new national government, allowing the continued presence of foreign troops with the effect of ending occupation, depends on the government's legitimacy. As is well known, in practice the legitimacy of new governments is often controversial. One way for government to have such legitimacy, is for it to be elected by the local population in an exercise of their right to self-determination. Express international recognition of such legitimacy could also offer important support.

In the case of Iraq, the Security Council endorsed the formation of the Interim Government - albeit limited in its competence.[6] This is recognition by the members of the UN Security Council of the Interim Government's legitimacy to act for Iraq and of its independence. This recognition has not been challenged by other States and thus is at least tacitly accepted. As such the Interim Government is in a position to consent to the continued presence of the Multinational Forces and to thereby bring occupation to an end - as stated in the Security Council Resolution and in the letter annexed to it, in which the Prime Minister of the Interim Government requested the Coalition Forces' continued presence. On the basis of this request the Multinational Forces turned from a hostile force in the sense of the Hague Regulations - i.e. one present without the consent of the local authority - into a friendly force, thereby putting an end to occupation.

The arrangements on the allocation of decision-making powers between the Interim Government and the Multinational Force, as described in the resolution, seem to support this conclusion. These include not just the abolition of the Coalition Provisional Authority but, more importantly, the fact that in operative paragraph 12, the Security Council decided that it would terminate the mandate for the multinational force, if requested by the Government of Iraq.

From a political point of view, it is difficult to conclude otherwise in the face of a Security Council resolution, which clearly states that occupation has ended. However, it is the reality and not the label that matters. From a legal standpoint

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6 "Endorses the formation of a sovereign Interim Government of Iraq (...) which will assume full responsibility and authority (...) for governing Iraq while refraining from taking any actions affecting Iraq's destiny beyond the limited interim period until as elected Transitional Government of Iraq assumes office (...)."

7 *Adam Roberts*, The Day of Reckoning, The Guardian, 25 May 2004; *Adam Roberts*, (note 20).

though, a formal proclamation of the end of occupation would be of limited importance if the facts on the ground indicate otherwise.[7] The test remains whether, despite any labelling in the Security Council resolution, a territory or part of it is "actually placed under the authority of the hostile army" as required by Article 42 Hague Regulations.

In this regard a decisive factor is the powers of the Iraqi Interim Government, such as whether it has political control over the military operations of the Multinational Forces and whether it has authority to overrule prior regulations of the Coalition Provisional Authority. It is obvious that the former occupying powers maintain a powerful military, economic and political presence in Iraq. However, if the Iraqi authorities have the power to demand the Multinational Forces to leave and also have the power to overrule the legislation set up by the Coalition Provisional Authority, regardless of whether they exercise these powers, the foreign army should not be considered hostile and can be seen as remaining in Iraq at the invitation of a fully sovereign government. In such circumstances, it would be difficult to continue to speak of an occupation.

If the Iraqi authorities were to request the foreign troops to leave - a possibility foreseen in Security Council resolution 1546 - and these did not comply with that request, or if the Iraqi government were not able to enact new legislation or overturn laws imposed during the occupation, then it could be considered as not exercising effective authority and could not be considered as fully sovereign. The facts on the ground would indicate that the Multinational Forces were exercising actual authority over Iraq. This would be a clear sign that a situation of occupation had resumed or had never ended.[8]

Question 6:

What about the application of international humanitarian law in Iraq post 28 June 2004?

In the face of continuing hostilities after 28 June 2004, the additional question arose as to which rules would apply to the new situation. The "commitment of all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including international humanitarian law",

8 See also *Adam Roberts*, (note 20).

referred to in the Security Council resolution, was an indicator that the Security Council envisaged and accepted its continued application. Moreover, in his letter annexed to the resolution, Colin Powell stressed the commitment of the Multinational Forces "at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions".

Proceeding on the assumption that the occupation ended because the foreign troops remained in Iraq with the consent of the Interim Government, does this mean that the conflict remains an international armed conflict or should it be re-qualified as non-international? Given that the Multinational Forces are fighting alongside and in cooperation with Iraqi armed and security forces, that report to the Interim Government, against armed opposition groups or armed actors, the ICRC believed that the hostilities could not be considered as international - i.e. as *opposing* two or more States.

The plain wording of common Article 2 to the four Geneva Conventions, as confirmed by the case law of the International Tribunal for the Former Yugoslavia, the *ICRC Commentary* and legal literature support this conclusion. All these sources require an armed conflict opposing at least two States. Given that the members of the Security Council - without objection from other States - identified the Interim Government as representing Iraq, it can hardly be argued that an international armed conflict continues between the Multinational Forces and the armed forces of the State of Iraq.

In view of this, the ICRC re-qualified the conflict as an "internationalised internal armed conflict" regulated by common Article 3 of the Geneva Convention and the customary rules applicable in non-international armed conflicts. In fact, it is possible that there are several such conflicts taking place in Iraq as it is likely that not all armed opposition groups are fighting "together".

This being said, taking into account the specific situation in Iraq, a more functional approach towards the law of occupation could also be defended. Such an approach could mean that whenever and in so far as the Multinational Forces exercise authority over persons or property in Iraq and carry out certain functions *in lieu* of the Iraqi Interim Government in specific fields, such as ensuring public order, they should apply the rules on occupation relevant to these activities.

Under the present circumstances in Iraq, the rules on occupation, such as the right of the local population to continue life as normally as possible, the right of the Multinational Force to protect its security, the obligation to restore and maintain public order and civil life and the standards and procedures allowing internment for security reasons to the extent compatible with applicable human rights law, seem to be well suited to serve at least as a guidance or as minimum standards.

Conclusion

To conclude, in view of all of this and of the realities on the ground, do we believe that the law of occupation is insufficient or outdated?

My answer once again is based on the ICRC's experience on the ground. Until Iraq the principal example of occupation was that of the Middle East. In that context the law could have been considered inadequate because it was not geared to deal with the long-term nature of the occupation. How to reconcile the assumption underlying the law, that occupation is temporary, with the reality of long-term occupation is an issue that needs to be considered.

Turning to Iraq, the practical legal questions which have arisen related to the practical application of the existing rules in a situation where there had been a significant breakdown of law and order. On no occasion were we faced with situations that did not already have a clear answer in the law, or where the application of this law gave paradoxical results. On the basis of our on-going dialogue with the occupying powers, I believe they share this conclusion.

As I mentioned at the outset, the greatest challenges faced in Iraq are more operational by nature:

- the blurring of the distinction between military forces and humanitarians in view of the number of humanitarian activities carried out by armed forces, and the risks this poses for humanitarians - and not just the ICRC - who may no longer be perceived as independent, impartial and neutral; and
- the - possibly consequent - targeting of humanitarians.

One last issue I would like to highlight is that today we have been looking at the "easy" case: the straightforward occupation by one state of the territory of another. However, in the past decade we have seen that there are many other different ways in which States - and international organisations - can exercise control over the territory of a state. This can take the form of

- occupation:
- peacekeeping forces exercising day to day control over territory:
- UN transitional administrations:

to name but a few.

Determining the applicable law in these circumstances is more complex. And something in relation to which affected States have turned to the ICRC for guidance. As an aside, it should not be assumed that States do not want to be told what the applicable law is. It is very important for them to know what the properly legal framework in which they are operating in is, so that they and individual members of the armed forces cannot face liability for their lawful acts.

In assessing the adequacy of the law and determining applicable rules, *all* relevant bodies of law must be considered. In clear cases of occupation, this includes the law of occupation - but also human rights norms. In other circumstances where a foreign power is exercising effective control over a territory, the law of occupation might not be applicable *de iure* - for example if the troops are there with the consent of the local authority - but it may be a very useful bottom line to apply by analogy, to be supplemented with relevant rules of human rights law.

In December 2003, the ICRC, in cooperation with Geneva's University Centre for International Humanitarian Law, organised an expert workshop on the Application of International Humanitarian Law and International Human Rights Law to UN Mandated Forces. The debates also addressed the application of the law of occupation to UN-mandated forces exercising control over or administering a territory.

One of the issues which came out from these debates was a request from troop-contributing States and from UN personnel with experience in transitional administrations for the elaboration of guidelines based on international humanitarian law, and in particular the laws of occupation, human rights norms and general principles of criminal procedure to be used as minimum standards to guide multilateral peacekeeping forces - be they military or police - in the initial phase of their activities. The aim would be to provide guidance in their efforts to restore and maintain public order and security, in particular with regard to searches, seizures, arrests and detentions in situation where the local judicial system is not functioning.

Examples of issues which could be addressed include:
- the time within which a person who has been held must be brought before a judge or judicial body;
- whether a decision to continue to hold someone must be made by a judge or judicial body or whether it could be a military lawyer;
- the question of whether a hearing would be necessary;
- the minimum standards to be applied in these cases.

Let me say to conclude that these guidelines would serve as a yardstick pending the amendment of existing local rules or drawing up of more detailed rules of criminal procedure appropriate to each particular context.

The ICRC and others were responsive to this very interesting suggestion. Work on this project has not started yet but it may be something on which we could report at a future colloquium.

Ladies and gentlemen, dear friends, I have exhausted your patience with a long legal analysis. My observations were technical and dry. Coming to the very end of my observations, I realise that I have not followed the advice that a colleague from Finland gave me recently, namely that in every speech one should make at least two jokes. An exception should be made, however, he said, for funeral speeches: there, one joke is enough. I tried to tell you a little joke in the beginning. With the funeral you have the second one.

I thank you for your attention.

Beginning and End of Occupation

Prof. Michaël Bothe

Introduction

In general terms, a belligerent occupation can be defined as a specific situation where the armed forces of one or more States are for a certain period of time present in the territory of another State without the consent of the latter.

Two situations must, indeed, be distinguished taking into account whether the occupied State has given its consent to the foreign military presence on its territory or not.

Where the territorial ("host") State consents to the presence of foreign States (occupying powers), a contractual relationship exists between the two States. The law of occupation does not apply, with the consequence that the rights and duties of the forces present in the territory flow from the consent.

On the contrary, where consent of the territorial State is lacking, the rights and duties of the occupying forces, and/or the rights and duties of the population of that territory have to be determined by a specific body of international law, *i.e.* the law of belligerent occupation. The matter is specifically regulated by Articles 42 to 56 of the Hague Regulation[9], and Articles 47 to 68 of the 4th Geneva Convention[10], which may apply as a matter of treaty law, but also constitute customary law.

9 Convention (II) with respect to the Law of and Customs of War on Land, The Hague, 29 July 1899.

10 Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

It needs to be pointed out that, in addition to these common features, hybrid cases of occupation also exist, where there is consent, but where the agreement in the specific context rather refers to the law of belligerent occupation. This is often the case of an occupation based on an armistice.

Furthermore, the law of occupation also covers the situation where there is "only" an occupation, and no other manifestation of armed conflict. This is clearly implied by Article 2 paragraph 2 which is common to the Geneva Conventions.[11]

Referring to the above-mentioned definition of belligerent occupation, we must distinguish two essential characteristics: a foreign military presence and the lack of consent of the occupied State.[12] The existence or absence of these two elements will determine the beginning and the end of an occupation.

The question of the conditions under which it is possible to speak of "presence", will be first addressed. This is, for instance, the case of three Dutch soldiers marching through Brussels without the consent of the Belgians authorities; this situation will certainly not be qualified as an occupation of Belgium by the Netherlands. A certain threshold of significance of the foreign military presence must be passed. A primary step will consist in identifying what this threshold is.

The second question concerns the conditions that will determine whether the "consent" is relevant to exclude the qualification of "belligerent occupation". History is full of examples of interventions where the territorial government did no longer, not yet or never did possess any effective governmental power over the territory in question. Does the consent given by such a government really exclude the application of the law of belligerent occupation?

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11 "In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof."

12 In order to simplify the reasoning, these two issues are dealt by the author assuming that the United Nations do not exist. However, towards the end of the contribution, the author addresses the question of whether his conclusions are affected by UN's decisions.

It is necessary to analyse these two sets of questions, in order to ascertain criteria for the beginning and the end of an occupation. These issues will be addressed, in a first approach, assuming that only States are the relevant actors. Thereafter, it will be considered whether the same approach may be valid in case of the presence of forces of international organisations. Special attention will be paid to the consequences of the decisions of the UN Security Council in this respect.

1. Military presence

1.1. The beginning of occupation:

According to Articles 42[13] and 43[14] of the Hague Regulation, there is "presence" when the foreign military forces go beyond the situation of fighting[15]. The provisions identify the threshold as characterised by two elements:

- the removal of the effective control of the established government of the territory; and
- the exercise of effective control over the territory by the foreign power.

Therefore, the "authority" has *de facto* passed into the hands of the occupant. This means that the occupying State must be in a position to exercise *de facto* powers similar to that of the government, which has been displaced. This is not yet the case while fighting is still going on. Similarly, there is no occupation where such *de facto* authority is only claimed but cannot actually be exercised.

After the fighting has ceased, and the "hostile army" has gained effective control over part of the entire territory, the situation of occupation begins. This entails important responsibilities to be undertaken by the occupying power; Article 43 expressly provides that the occupant:

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13 "Territory is considered occupied when it is actually placed under the authority of the hostile army" *(as highlighted by us)*.
The occupation applies only to the territory where such authority is established, and in a position to assert itself."

14 "The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." *(as highlighted by us)*

15 Article 2 common to the Geneva Conventions does not contain a definition of "occupation", and the relevant provisions of the IV Geneva Convention are "supplementary" to the Hague Regulation (Article 154 of the IV GC) and apply in combination with them.

"… Shall take all the measures in his power to restore, and ensure, as far as possible public order and safety"[16]

These new responsibilities lie with the occupying State in a very first stage. The Iraqi case showed that the U.S. forces did not realise how fast the threshold from fighting to occupation can be crossed.

In that perspective, military powers might need to rethink the rules of engagement. The Iraq war showed indeed that the welfare of the local population was only brought into consideration at quite a later stage.

1.2. The end of occupation:

It would seem natural that occupation ends when there is withdrawal of the foreign military forces from the territory, either forced by the local army or voluntary.

It would be the situation of an occupying power actually leaving the occupied area completely, and giving room for the unrestrained exercise of governmental powers by the legitimate government of the territory.

This however is not often the case in reality. The withdrawal could only entail the "thinning out" of the foreign army. Then, it becomes a question of degree whether the effective control has ceased or not.

In case of partial withdrawal, the occupying power cannot relinquish its responsibilities by simply declaring the end of occupation. It has the duty to facilitate the entry of a fully-fledged legitimate government.

The Israeli withdrawal from the Gaza Strip must be assessed in the light of these considerations. It is, however, not clear, whether one can consider that the occupation of the Palestinian territory has been terminated.

2. Belligerent occupation v. consented presence:

Occupation is, by definition, an asymmetric relationship: most often, the occupying power possesses a superior force in relation to the government of the occupied State.

16 It is worth noting that the French version uses the terms "ordre et vie publics" *(as highlighted by us).*

In these circumstances, the question of genuine, and freely expressed, consent is delicate.

Article 47 of the IV Geneva Convention provides that consent expressed by the authorities of the occupied territory, after the beginning of occupation, is irrelevant, where it would result in the diminution of the rights of the population guaranteed under the Convention.[17]

There are, indeed, cases where the former government of a territory had been removed through illegitimate means, and replaced by another government which then gave consent to a foreign military intervention.[18] Consent given in those circumstances is tainted.

The question remains, however, to determine whether the protective regime provided for in The Hague Regulation and the IVth Geneva Convention applies. This assessment needs to be carried out on a case-by-case basis, particularly in situations where the territorial government giving the consent, only controls part of the national territory.[19]

Where it is considered that there is no genuine, freely expressed, consent given by the legitimate and effective government, the foreign military presence must be regarded as belligerent occupation.

It is worth noting that the appraisal of the situation must be based on objective criteria. It cannot depend exclusively on the judgment of the two States involved. The Geneva Conventions therefore provide for an *erga omnes* regime, where the Member States and the International Committee of the Red Cross (ICRC) dispose of a *droit de regard* on the situation.

17 "Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory."

18 For instance, in Hungary in 1956 and Afghanistan in 1980.

19 This is the case of an internationalised armed conflict where the law of international armed conflicts applies, at least to the relationship between the foreign intervening power and the non-governmental party to the conflict. Where the intervening country gains control over an area previously held by insurgents, there are two possibilities: either the authority of the pre-existing government may simply be re-established. In that case, the presence of the forces of the intervening power in this area is based on consent. Or, the authority of the pre-existing government is not re-established, at least for the time being. Then, the presence of the foreign intervening power becomes a belligerent occupation if the requirement of Articles 42 and 43 of the Hague Regulation are fulfilled.

The next question to be solved is the re-qualification of the evolving situation: consent that did not exist in the beginning of occupation, may occur afterwards, and consequently change the legal regime of the foreign presence. On the contrary, consent initially given may later disappear.

The first situation refers to a "supervening consent": the situation starts as a belligerent occupation until the receiving State consents to the foreign presence on its territory. Article 47 of the IV Geneva Convention does not exclude this possibility, although occupation has already begun: agreement may be found between the occupying power and the government of the occupied State even outside the framework of a common peace treaty.

The Iraqi case gives a good picture: the Interim Government of Iraq has agreed to, and even requested, the continued presence of the Multinational Forces (MNF), acting under UN Security Council mandate.[20] The qualification of the current situation raises many questions.

The core issue concerns the independence of the legitimate government giving its consent to the foreign presence. The government expressing such consent must be more than a creation of the occupying power.

In the case of Iraq, the legitimate character of the Interim Government requesting a continued presence, despite the fact that elections have taken place, is at stake. In this respect, it is significant that the UN Security Council has endorsed this arrangement.[21] However, the question remains to determine whether UN's endorsement of such a situation is conclusive.

The second situation refers to a "disappearing consent". This case implies that consent given by the government to foreign military presence may be revoked, may cease to exist or does no longer cover the behaviour of the military forces.

Example of such a situation is the UN General Assembly's Resolution on the definition of aggression.[22] An act of aggression is there defined as:

"The use of the armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in

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20 Resolution 1511 of 16 October 2003.
21 Resolution 1546 of 8 June 2004.
22 Resolution 3314 of 14 December 1974.

such territory beyond the termination of the agreement.[23]"

In such a situation, the continued presence of foreign armed forces is no longer covered by the consent of the receiving State. As soon as the consent ceases to be effective, a belligerent occupation begins. This consideration must be taken into account in the current Iraqi case.

3. Consequences of the UN Security Council

The UN Security Council may take three types of decisions in relation to a situation of foreign military presence in a State:

- It may address the problem of applicable law to a situation, although such a situation may have developed without any input from the Security Council;
- It may give a mandate for the presence of armed forces of a State or of a group of States;
- It may establish a United Nations presence.

The first possibility has occurred in relation to certain rules applicable to the Israeli occupation of Palestinian territories, as well as in relation to the presence of coalition forces in Iraq. In both cases, the Security Council Resolutions had the sole aim of placing beyond legal doubt the specific legal position regarding the regime of occupation. The Security Council is entitled to use its powers, under Chapter VII of the UN Charter, to facilitate the restoration of peace.

The second possible decision to be taken by the Security Council can be illustrated by the situation in Bosnia-Herzegovina after the Dayton agreement, as well as in Kosovo after the armistice, in East-Timor (first phase) and in Iraq (second phase). The authorised presence of the armed forces of one or a group of States was then qualified then as being UN presence.

It must be stressed that the UN mandate concerns only the *ius ad bellum*. Then, it is a matter of interpretation of the mandate whether it goes beyond the regime of *ius ad bellum* and addresses particular issues of substantive law of occupation. The Security Council has done that, particularly in the case of Iraq and Kosovo.

23 An agreement terminates when it is so declared by the receiving State, regardless of the question of whether it was legally entitle to do so. As far as the conditions of applicability of IHL regime are concerned, only the facts are relevant: IHL regime should be applicable where there is a *de facto* situation requiring that application.

The last possibility relates to the actual UN presence on the territory of a State, and raises the application of international humanitarian law to the UN troops. In this respect, it is important to stress that the UN troops are bound by customary international law, including the law of belligerent occupation, at least to the extend that the Security Council has not decided otherwise.

In conclusion, it must be emphasised that, in determining the beginning and end of occupation, the necessary case-by-case assessment remains a difficult task. The above-developed analysis tries to point out criteria to define belligerent occupation, *i.e*. significant foreign military presence and absence of consent. The existence and/or non-existence of those criteria will determine the beginning and/or the end of occupation.

The examples given show that there is no definite answer for particular cases. For every situation, a new assessment of the facts according to the objective criteria pointed out, is necessary.

Beginning and End of Occupation - UN Security Council's Impact on the Law of Occupation

Prof. Erika de Wet

Introduction

Since the end of the Cold War, the UN Security Council has increasingly authorised a variety of mandates based on Chapter VII of the UN Charter, which reflect some similarities with an occupation regime.

Recent History has shown several examples of these kinds of authorisations, such as the UN mission in Somalia in 1993 (UNOSOM II)[24], the extensive mandate authorised for Eastern-Slavonia in 1995 (UNTAES)[25], the UN civil (UNMIK) and military (KFOR) presence in Kosovo in 1999[26], the Transitional Administration for East Timor (UNTAET) in 1999[27] and the Coalition Provisional Authority (CPA) in Iraq in 2003[28].

As reality has shown, these mandates authorise a varying degree of military and civil administrative powers that could actually result, for instance, in the introduction of new legislations in all areas of law.[29]

The core questions are therefore whether the United Nations has the competence to authorise such extensive mandates, and on which legal basis. In other words, would a UN Security Council Resolution authorising an

24 Resolution 814 of 26 March 1993.
25 UN Doc. S/1995/951
26 Resolution 1244 of 10 June 1999.
27 Resolution 1272 of 25 October 1999
28 Resolution 1483 of 22 May 2003.
29 Some examples can be pointed out such as the introduction of extensive banking and telecommunications reform in East Timor; the development of a free market economy in Iraq; the introduction of substantive provisions of the UN Convention for the Sale of Goods in Kosovo.

administration, end the applicability of the law of occupation?

The last question is particularly relevant taking into account that one of the underlying principles of the occupation regime is that the occupying power must, as far as possible, respect the legal system in place, only deviating where absolutely necessary.

We will first address the issue of the legal basis vesting the Security Council with the competence to authorise extensive mandates. We will then elaborate on the existence of *implied* and *customary* powers as a basis for Chapter VII of the UN Charter mandates. The unsuitability of the law of occupation to justify the competence of the Security Council to authorise those mandates will briefly be examined, as well as the fact that core elements of International Humanitarian Law nonetheless limit the powers of the Security Council when authorising such mandates.[30]

Finally, some conclusions will be drawn concerning the implications of the UN Security Council mandates on the beginning and end of occupation.

1. The legal basis for administration

Provided the important implications that could flow from a UN Security Council's mandate for administration, the determination of the accurate legal basis is of great importance.

Chapter VII of the UN Charter provides for a "trusteeship system". However, it can be set aside from the outset. The provisions limit indeed the applicability of the system to three specific categories of situations, namely: territories formerly held under the mandate system of the League of the Nations; those detached from enemy States as a result of World War II; and territories voluntarily placed under the trusteeship system by States responsible for their administration.

Therefore, an alternative basis for authorising such administration is to be found in the so-called *implied* and *customary* powers of the United Nations.

The *implied* powers, also referred to as the doctrine of *inherent* or *incidental*

30 For an extensive analysis of these points see Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, Oxford, 2004), pp. 204 ff; ibid "The Direct Administration of Territories by the United Nations and its Member States in the Post Cold War Era: Legal Bases and Implications for National Law", 8 *Max Planck Yearbook of United Nations Law* (2004), 291 ff.

powers, have been recognised by the International Court of Justice (ICJ).[31] Those are powers, which, although not expressly granted by the Charter to the Security Council, are conferred upon it by necessary implication as being essential to the performance of its duties, namely the maintenance of international peace and security. It can be said that the *implied* powers of the Security Council were to some extent already present in the Charter, and need to be translated into modern reality.

For example, in the *Tadic* advisory opinion, the International Criminal Tribunal for the former Yugoslavia (ICTY) affirmed that it was created under Article 41 of the UN Charter. That provision authorises binding measures of non-military nature but does not explicitly mentions the creation of criminal tribunals. The Court stated that the setting up of those tribunals was nonetheless necessary for the maintenance of international peace and security, and was to be seen as an *implied* power.

It must be however noted that such kind of broad interpretation of the Charter could give extensive power to the UN organs. It can be rather worrying since "anything" could be implied.

Apart from explicit and *implied* powers, international organisations are recognised to have another set of powers at their disposal, namely *customary* powers. These are "new" powers, which are not necessarily agreed (or foreseen) at the time of the creation of the organisation. They come into existence through the practice of the organisation and through the acquiescence of the member States.

The difference between *implied* and *customary* powers is sometimes difficult to discern and rather academic. A good example is the *Nuclear Weapons (WHO) Advisory Opinion*[32], where the ICJ had to determine whether the WHO was competent to address the issue of the legality of the use of nuclear weapons. As this competence was not explicitly provided for in the WHO's constitutional act, the Court looked at the practice of the organisation as an element of treaty

31 *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Rep 1949: the Court recognises the fact that international organisations would not be able to fulfil their functions efficiently in a rapidly changing world, if their powers were limited to those explicitly attributed to them at the time of their creation. See also the decision of the International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Dusco Tadic*, Decision on the Defence Motion for Interlocutory Appeal and Jurisdiction, Case n° IT-94-1-T, 2 October 1995, Appeals Chamber.

32 ICJ, Legality of the use by a State of nuclear weapons in armed conflict, Advisory opinion, 8 July 1996.

interpretation, in accordance with Article 31 of the Vienna Convention on the Law of Treaties.[33] The ICJ consequently concluded that the WHO did not have *implied* powers to deal with that matter, since such competence could not be deemed necessary to fulfil the tasks assigned to it by its member States. It could have equally argued that the WHO did not possess *customary* powers in the field of nuclear activity, given the absence of long-standing practice of the organisation in this field.

With regards to the existence or otherwise of either *customary* or *implied* powers, the general acceptance requirement of the practice of the organisation by its member States is of significant importance - in particular for unrepresentative organs, such as the Security Council. In practice, however, the threshold determining that consensus "among the international community" has been reached is not so high.

This is the logical consequence of the presumption of legality that is attached to the Security Council's resolutions. Therefore, it rests on member States to voice their objection to a particular practice at an early stage, in order for them not to be prevented from doing so at a later stage by the principle of acquiescence.[34]

As a matter of example, it may be concluded that all the mandates authorised by the Security Council, except for the one mentioned above (the CPA in Iraq), were accepted by the international community as a legitimate measure for conflict resolution.

Indeed, with the exception of the CPA every mandate has been explicitly endorsed by the General Assembly either directly through an express support, or indirectly, by recognising the expenses of these administrations as "expenses of the organisation".

The fact that a large and representative UN organ, where all the member States are represented, has endorsed these missions, is a clear indication that the international community supports this type of administration as a legitimate measure for the maintenance of international peace and security.

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33 Article 31 (3) (b) provides that "Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be taken into account during treaty interpretation.

34 See Legal Consequences of States of the Continued Presence of South Africa in Namibia, ICJ Rep 1972.

The case of the CPA in Iraq is more ambiguous. On the one hand, the General Assembly never clearly expressed support for the CPA.[35] On the other hand, no outright rejection of this form of civil administration has been expressed by the member States. As the time passes, it becomes increasingly difficult for member States to raise arguments about the illegality of the CPA authorised by Resolutions 1483 and 1511.[36]

In conclusion, it can be argued that these new types of mandates authorised by the Security Council since the beginning of the nineties, combining civil administration with military elements, are now generally accepted. They would be based on the *customary* or *implied* powers of the UN organ.

2. The UN Security Council's implied and customary powers

According to international humanitarian law rules, the law of occupation applies from the outset of any armed conflict and continues to apply beyond the general close of military operations.

It must, however, be kept in mind that while the Security Council can resort to those kind of broad powers, it is also empowered according to Article 103 of the UN Charter, to deviate from international rules. This could eventually lead to the possibility for the Security Council to override public international law, including IHL principles.

Having determined the legal basis, the question now arises whether the law of occupation, as laid down by international instruments such as the Hague Regulations and the substantive provisions of the IVth Geneva Convention, still applies to the presence of UN forces acting under Chapter VII of the UN Charter.

First, some consider the fact that the UN is not strictly bound as States by the Geneva Conventions. They substantiate their position with the argument that the contributing States shall take primary and direct responsibility for the international humanitarian law violations committed in the administered territory by their own troops. That would relieve the UN from any obligation in this regard.

35 It must also be pointed out that at the time of the adoption of Resolution 1483, voices for stronger UN supervision and administration were raised. That suggests that the international community did not fully accept this civil administration.

36 Resolution 1511of 16 October 2003.

However, even though the UN would not be bound to international humanitarian law in the same way as States, this cannot be understood as liberating the UN organs from respecting any norms of international humanitarian law. UN authorised presence would remain bound at all times by the core content of the Geneva Convention, and particularly common Article 3.[37]

Secondly, the matter is complicated by the Convention on the Safety of United Nations and Associated Personnel of 9 December 1994, and which criminalises attacks on UN personnel. The problem arises from the fact that the Convention and the law of armed conflict are mutually exclusive. Therefore, the threshold of the law of international armed conflicts is the ceiling of the Safety Convention.

The Convention applies to all operations established by the Security Council and conducted under UN authority and control. These criteria are broad enough to cover Kosovo-kind missions. The sole exception concerns enforcement actions under Chapter VII of the Charter, authorised by the Security Council, in which UN personnel acts as combatant against organised armed forces. The law of international armed conflict then applies as in the case of the first Gulf War or during the Korean War.

Therefore, it is to be expected that the States contributing with large number of personnel to the UN authorised operations will be extremely reluctant to accept that the UN forces have forfeited the protection granted by the Safety Convention. Those countries do not regard themselves as parties to the conflict in the strict sense, and especially in the context of an internal armed conflict where Chapter VII operations were conducted under national command and control, such as those undertaken in Somalia, Rwanda, Haiti and Kosovo.[38]

Consequently, the nature of the type of intervention, the impact of the Safety Convention and the attitude of the UN itself towards international humanitarian law make difficult and somehow conceptually unconvincing to accept the law of occupation as the basis for these types of mandates.

37 For an elaboration of the argument that the UN (and its organs) created a binding legitimate expectation that it would respect common Article 3, see De Wet (Chapter VII), note 2.

38 Although the Safety Convention was not in force at that time the States involved did not consider themselves as party to the conflict in the strict sense, because their role was different from the classic belligerent. See extensively De Wet (Direct Administration of Territories), note 2.

3. The law of occupation and the administration of territories

It would be inaccurate to regard the law of occupation as the legal basis for any of the administrations discussed before. Under this regime, the powers of the occupant are indeed strictly limited since it seeks primarily to regulate the conflict between the military interests of the occupant, the humanitarian needs of the population and the prohibition to take measures that would pre-empt the final disposition of the territory at the end of the conflict.

Therefore, the occupying force is obliged to administer the territory in accordance with the existing law and for the benefit of the population. The only exception is where changes are required for the "legitimate needs" of the occupation, such as the security of the armed forces or the functioning of the administration.

Following these principles, it is unlikely that the law of occupation provides a legal basis for the whole spectrum of measures adopted in the different administrations above-mentioned, such as the development of a free market economy in Iraq or the privatisation of formerly state-owned companies in Kosovo.

Those measures go much further than the "permitted" deviation from the local legislation for "legitimate needs".

Conclusion

The dynamic character of the *implied* and *customary* powers of the UN combined with the presumption of legality attached to Security Council resolutions have lead to a significant extension of the powers of the UN in relation to administration of territories.

If the true legal basis for the extensive regulatory actions of UN authorised administrations is to be found in the *implied* and *customary* powers of the Security Council, the core elements of international humanitarian law provides an outer-limit that the UN authorised administrations and personnel have to respect at all times.

Although the competence of the Security Council to deviate from international law would allow it to provide for more extensive administration than strictly allowed by the law of occupation, such measures always have to be in accordance with the basic principles of international humanitarian law, particularly Article 3 common to the Geneva Conventions.[39]

In essence, Security Council's mandates reaffirm the applicability of the law of occupation as far as the core principles of international humanitarian law are concerned. At the same time, it ends the occupation regime in the sense that if freezes those under Security Council mandate and allows them to deviate from the law of occupation in areas that do not negatively affect core protection principles. If, politically speaking, such action may not always be the wisest decision to make, it is nonetheless legal.

Question-Time: Beginning and End of Occupation

Could we consider that a UN mandate, rather than actually "ending" a state of occupation, "freezes" up the situation preventing the occupying power to do more than what it would be allowed to do under the law of occupation? This assertion seems to make sense in a context of Iraq, for instance.

Prof. de Wet agrees with the suggestion. When saying that a UN mandate "ends" an occupation she meant to provoke the debate but certainly prefers the articulation proposed: a UN mandate "freezes" up the situation and possibly prevents from certain deviations. However, such reasoning does not prevent the occupying power from every deviation and does not solve the problem concerning the extend to which it may deviate. Prof. de Wet thinks that reference to *ius cogens* is not sufficient to limit the actions taken by the occupying State, particularly because there are so few norms of *ius cogens* that are undisputedly recognized.

Prof. Bothe adds that indeed *ius cogens* constitutes a set of fundamental principles. More precise norms are needed here. He too agreed with the proposal suggested. For instance, in Iraq on the 28th June 2004, the Iraqi government gave its consent to the presence of foreign troops on its territory. The question of whether that consent ended the occupation regime has been raised several times, particularly because it has been endorsed by the UN Security Council. Prof. Bothe questions that assertion: Security Council Resolutions are

39 Equally, the Security Council could not be allowed to mandate the Member States or regional organisations unless it has the assurance that they would respect the basic norms of international humanitarian law.

binding but can not change the facts. Therefore that kind of situation creates tensions because from an IHL perspective, regulatory needs of a factual situation are preferred to legal constructions based on status.

Contexts such as Afghanistan and Iraq today are difficult to qualify, and could be considered as "grey" contexts. What legal framework should therefore apply to them?

Prof. Bothe qualifies both contexts as **internationalized internal conflicts**. According to his interpretation of customary international law, the law relating to international armed conflicts applies at least to the relationship between the foreign intervener and the non-governmental party in the country where the intervention takes place. It seems that it was the practice of the United States in the Vietnam conflict, and at that time had a very practical consequence: Vietcong fighters who qualified as combatants were not handed over to the South-Vietnamese authorities, but treated as prisoners of war by the US. However, this is acceptable when there is an armed conflict between the foreign intervener and some non-governmental party on the territory. A different scenario is when the foreign intervener seeks to provide assistance to the existing government in matters of law enforcement. Different rules should then apply. In practical terms, it is however difficult to determine which situation occurs. Referring again to the Vietnam conflict, the assessment was easy: as far as the US were concerned, they were involved in an international armed conflict: South Vietnam, the Vietcong and North Vietnam. The tricky question was to determine who combatants were. Prof. Bothe's impression is that there is a split situation in Afghanistan: on the one hand, there are still elements of armed conflict. On the other hand, assistance is provided in matters of law enforcement with the consent of the newly recognized government. As far as Iraq is concerned, it seems that the situation is evolves closer to an internal armed conflict "with foreign intervention".

Qualifier l'actuelle situation en Irak de conflit interne, certes internationalise par une présence étrangère est également la position du CICR. Par contre, pour en revenir à la discussion sur la relation entre consentement du gouvernement irakien (quant à la présence étrangère sur le territoire et résolution du Conseil de Sécurité (qui "mettrait fin" à l'occupation), comment peut-on avoir aujourd'hui un conflit interne internationalisé s'il y a toujours occupation en Irak ? De deux choses l'une : soit il n'y a pas d'occupation en Irak (Position du CICR) et donc le conflit doit être qualifié de non international, soit il y a toujours occupation et le conflit reste international.

Prof. Bothe explains that the two situations must be distinguished although they are not mutually exclusive. On the one hand, new armed conflicts may arise during occupation. A good example of that are the resistance fights against foreign forces in Iraq. They are not part of the Iraqi government and must be considered as new parties to the conflict. This raises the question of the status of resistance movements. During the Second World War, resistance movements were linked with the main parties to the conflict. Different sets of rules then applied. In Iraq the situation is rather different since actions of those resistance movements can not be attributed to any of the original parties to the conflict. Another example is the situation of the Palestinian occupied territories: if Hamas became party to the conflict because its status was developing, parties to the conflict being the Palestinian people cannot be blamed for what Hamas does. He considers, although he understands that it is controversial, that when a new party to the conflict emerges, a new conflict is created which is different from the conflict between the original parties.

Prof. Bothe has therefore doubts as to the idea often heard on the necessity to create a new law that would address the particularities of these kinds of new situations. On his opinion, the old-fashioned law of international armed conflicts, including belligerent occupation, has served useful purposes. Sometimes that law is challenged on wrong grounds. If present rules have to be changed there are ways to do it. After all, the Geneva Conventions have been completed over the years.

On the contrary, Prof. de Wet says that she believes that a new law is currently under development and that nothing can be done about that. Looking back at all the mandates adopted since Somalia, we realise that the treaty system does not respond to these new situations. The law of occupation is not the framework from which all the answer will flow.

Regarding the Gaza strips and assuming that Israel would complete the withdrawal, in terms of giving the Palestinian the control of the international borders, would it still not be a problem to say that the occupation of the Gaza strips has ended because the link between the Gaza strip and the West bank? So, even if Israel would give the Palestinians control over the international borders of the Gaza strip, would it be even then possible to say that the occupation has ended in the Gaza strip?

On the one hand, one could say that there are two separate geographic entities: Gaza strip was under the Egyptian control and the West bank under the Jordanian control. They could be considered as separate entities, but at the end of the day, it is the same people. Not only are the same people, the two different entities were recognised linked in the Oslo accords. Moreover, the people from the two places need free movement between the two in terms of family ties, employment, education, etc. The connection cannot be severed.

On Prof. Bothe's opinion, questions concerning effective authority, in particular in the case of Gaza, must be addressed taking into account the viability of the authority of the "non-occupied" part of what formerly was the entire occupied territory. One must ask whether Gaza is actually a viable unit where effective Palestinian authority can be exercised taking into account that the authorities do not sit in the Gaza strips but in Ramala.

Both Gaza and the West Bank, were not necessarily territory of a State: Egypt never claimed Gaza as part of its territory and the West bank, although it was a somehow different, it was not internationally recognised. Therefore, coming back to your definition of "occupation", did we ever have an occupation in the legal sense?

Prof. Bothe recalls that History is very controversial on this point: the only thing that we know with certainty is that Gaza was Turkish at the end of Second World War. Since then all assumptions are controversial although it is true that Egypt never claimed sovereignty over that territory. The major reason why we generally assume that Gaza is under an occupational regime is that the situation occurred within a context of armed conflict between Israel and at least three other States, being Egypt, Jordan and Syria. This has been confirmed by the International Court of Justice in its recent advisory opinion on the "Wall". The status of the relevant territories has certainly changed but it is still considered a belligerent occupation.

Collegium, No.34, Autumn 2006

Detainees operations during occupation and stabilisation operations

Col. John T. Phelps [40]

During all military operations, ranging from peace-keeping, war, occupation and stabilisation, there will be civilian detainees held for reasons of security, investigation and criminal activity. The treatment and disposition of detainees present significant legal, political, security, military and moral issues for the detaining authority. Mistreatment and violations of detainee's rights can have a major impact on operations, relations with the local population, as well as, a negative impact on the public and political support, both nationally and internationally, for the operation. One needs to look only as far as the scandal at Abu Ghraib to appreciate this and to understand the importance of compliance with national and international law.

During an international armed conflict, the primary rules for civilian detainees can be found in the 4th Geneva Convention and Additional Protocol I. During a non-international armed conflict, Common Article 3 of the Geneva Conventions and the Additional Protocol II are applicable. In addition, customary international law, applicable treaties and in certain instances the domestic law of the detaining power, as well as, the occupied/host nation may be applicable. For example, in Iraq, the US military Uniform Code of Military Justice (UCMJ) was used to court martial U.S. soldiers accused of abuse at Abu Ghraib. On the other hand, the domestic law and courts of Iraq are used to deal with detainees accused of crimes against Coalition Forces or the Iraqi Government.

In Iraq, detainees are interned under the authority of Article 78 of the 4th Geneva Convention as “necessary for imperative reasons of security.” Under the

40 This contribution expresses the views of Col. John T. Phelps, and not necessarily those of the U.S. Army, Department of Defence or the U.S. Government. It is based primarily on Col. Phelps' experience as the Legal Advisor for Allied Forces Southern Europe and more recently as the Legal Advisor for Task Force 134, Detainee Operations, and Multi-National Forces Iraq.

Geneva Conventions, these security detainees have a number of rights, including a right of appeal and a periodical review, if possible, every six months. In addition, detainees are entitled, at the very least, to humane treatment; protection from violence, intimidation, insults and public curiosity; equality of treatment; adequate medical care; respect for the person and honour and no renunciation of their rights or status. These protections can be primarily found in Articles 27, 31 and 42 of the 4th Geneva Convention.

Turning to Abu Ghraib, it is worth looking at some of the factors that contributed to the misconduct by US soldiers. The actions of U.S. soldiers at Abu Ghraib violated the requirements of the Third and 4th Geneva Conventions, Common Article 3, Protocol 1, the Convention Against Torture, and U.S. domestic law in the form of the Uniform Code of Military Justice. The courts martial as well as the disciplinary actions taken against other soldiers were not only appropriate but also necessary to ensure that another such incident does not occur again.

On a positive note, this scandal was brought to light by a low ranking U.S. soldier, a corporal, who reported it to his chain of command on January 13, 2004. Upon learning of the allegations on January 16, 2004, the Commander of Multi National Forces Iraq ordered the first of seven major investigations into the scandal and issued a press release stating that the U.S. was investigating allegations of abuse at Abu Ghraib. These investigations resulted in the release of a number of soldiers including the commander in charge of detainee operations. In addition, disciplinary action, including the referral of court martial charges, was taken against the soldiers responsible for the abuse. All of these actions were taken well in advance of the major outcry that occurred in April 2004 - when pictures of the abuse were released by the U.S. television network. As they say, a picture is worth a thousand words. Even though the world outcry was swift and forceful, it would have been worse had U.S. commanders not acted positively when the abuse was first reported by the corporal in January 2004.

What went wrong at Abu Ghraib? First of all, it was a failure of leadership. The chain of command failed to properly exercise their command and supervisory responsibilities. This included being visible and present at Abu Ghraib among the troops. By way of contrast, the new commander charged with dealing with the aftermath of the scandal, Major General Geoffrey Miller, immediately established a strong command presence and a sense of discipline among the

soldiers and the chain of command. He routinely inspected all aspects of operations, met with guards and interrogators and set up procedures to hear detainees' complaints. In short, he did what a commander is supposed to do: establish discipline, set up and enforce standards and demand adherence to the requirements of the law. He restored responsibility and accountability to detainee operations and demanded respect for and compliance with the law.

Other problems included a lack of adequate training and supervision of the military police guards and the military intelligence interrogators. If the guards and interrogators had been trained to standards and followed established U.S. Army doctrine, set forth in the applicable field manuals, inappropriate behaviour at Abu Ghraib would have never happened. Still, even the best trained soldiers will commit offences and the causes of such lapses can often have explanations other than poor training and supervision.

In my opinion, other possible explanations for the abuse may include the atmosphere created after the September 11 attacks in New York City and Washington DC. The possible use of torture against terrorists was being openly debated in the U.S. press with a number of prominent public officials and academics supporting its use. Coupled with the ever present need for intelligence, some soldiers may have concluded that the normal rules no longer applied. While this type of approach has no basis in law, soldiers are not lawyers. This illustrates the point that commanders and civilian leaders of national and multi-national police and military forces must not only ensure that their forces are trained to do their jobs but they must ensure that they are aware of the applicable law. This can be accomplished through initial deployment training and periodic training throughout the mission. Finally and most importantly, they must routinely inspect and monitor for compliance. In this regard, the detainees' visits by the International Committee of the Red Cross (ICRC) can be extremely helpful. ICRC's visits should be welcomed by commanders as an independent and neutral check on operations that can assist in identifying problems before they become major issues. Military legal advisors should stress to their commanders not only the legal requirement of cooperating with the ICRC but the benefits as well.

Two other aspects of detainee operations deserve to be addressed. The first is the procedure for dealing with detainees who commit crimes. In Iraq individuals who commit crimes against Coalition Forces or the Iraqi government are detained and classed as criminal detainees. Although several options were

initially available to the Coalition Provisional Authority (CPA), use of courts martial or military commissions, they chose to try the detainees in Iraqi courts using the substantive and procedural law of Iraq. This was the best and most workable option. At the beginning of the occupation in Iraq, the Iraqi judicial system was not functional. In order to establish a working court in a relatively secure location the CPA created the Central Criminal Court of Iraq (CCCI) and located it in Baghdad. The judges, prosecutors, defence counsel and court personnel are all Iraqis. The CCCI has nationwide jurisdiction and handles both the investigatory hearing and the trial. It is still functioning today and has expanded in size and authority.

Although the CCCI has experienced many problems; threats to include attacks against court officials, lack of funding and lack of acceptance by some Iraqis, it has been largely successful. It was the first major step forward in establishing the rule of law in Iraq and it clearly gave the Iraqis control over the legal disposition of Iraqis accused of crimes against the Coalition Forces and the Iraqi Government. For those who have worked with the CCCI, the independence and impartiality of the Iraqi judges are not in question. This has been proved by their record of acquittals as well as convictions.

Finally, as I previously pointed out, Article 78 of the 4th Geneva Convention requires that security detainees receive periodic review of their internment. This was initially accomplished by a Detainee Review Board consisting of three U.S. colonels who reviewed the case file of each detainee, including any matters the detainee wished to submit. In July 2004 this was replaced with the Combined Review and Release Board (CRRB). In addition to the three U.S. officers, the CRRB also included six Iraqis, two each from the Iraqi Ministries of Justice, Human Rights, and Interior. The standard of review was whether or not the detainee presented an imperative threat to the security of Iraq or Coalition Forces. As of September 16, 2005, the CRRB had reviewed 18,366 cases. Of that number 3,367 were released, 6,806 were released with a guarantor and 8,193 were sent back to continue their internment. Release with a guarantor required the selection and appointment of an Iraqi citizen who would guarantee the detainee's conduct upon release. To be a guarantor the individual should be a community or religious leader. All guarantors were selected and approved by the Iraqi Ministry of Justice.

The CRRB process was created to allow for greater Iraqi participation in the detainee process as well as to comply with the requirements of Article 78. It

ensured by virtue of the membership makeup that the Iraqis would have the controlling vote in all of its recommendations. It was another step in not only safeguarding the rights of detainees but in furthering the rule of law in Iraq.

In conclusion, it is clear that the manner in which detainees are dealt with is vital to the success of any operation. Existing law, primarily the Geneva Conventions, domestic law and applicable treaties, are more than adequate to deal with the majority of issues. Commanders and leaders at all levels must ensure compliance with national and international law by their soldiers, police and other government employees. If there are violations of the law, and they will occur, investigations must be swift and public.

Applicability of Human Rights Law in Situations of Occupation

Mr. Noam Lubell

Introduction

The question of the applicability of international human rights law during times of occupation has been discussed plentifully. Virtually every international body, including United Nations human rights mechanisms, the European Court of Human Rights (ECHR) or the International Court of Justice (ICJ), that has faced this question, has come up with the same answer:- *human rights law applies in times of occupation.*

However, while the general applicability may have become accepted, a number of questions remain with regard to how, in times of military occupation, human rights law is actually to be implemented; and how this body of law can work side by side with the rules of international humanitarian law (IHL), the body of law designed to regulate armed conflict including military occupation. Only two (of the many) problematic issues will be addressed here. The first concerns the rules regulating the use of force, and the second issue is the question of human rights obligations covering economic, social and cultural rights.[41]

1. The use of force during occupation

In times of military occupation, the use of force by the occupying power is expected to be governed similarly to policing powers, by what is known as the law enforcement model, as found in human rights law.

41 For further development of some of the points raised in this presentation as well as additional related issues, please see N.Lubell "Challenges in applying human rights law to armed conflict" *International Review of the Red Cross* Vol. 860.

Such a model differs in many ways from the use of force during the conduct of hostilities, in accordance with the rules of IHL. Under IHL rules, straight resort to lethal force is sometimes permitted. Indeed, during an international armed conflict, those individuals participating in hostilities and who are defined as combatants, could be considered legitimate targets that can be fired upon at all times, irrespective of the situation in which they are found (unless they are *hors de combat*, e.g. wounded or taken prisoner).

Under the "law enforcement" model, however, physical force shall only be used where absolutely necessary. Furthermore, resort to lethal force has to be the very last recourse.

The primary reason for arguing that the law enforcement model should apply in times of occupation, is the assumption that, the military occupying power has effective control over the territory, and that since the actual fighting and hostilities have terminated, the IHL rules on use of force are not necessary. Consequently, law enforcement rules of the policing type will apply.

However, this is perhaps too simple an explanation that does not take into account all possible realities. Hostilities do occur during occupation: the situation in Iraq after May 2003 is a good example. President Bush announced the end of major combat operations, and the U.S. and UK were recognised as occupying powers, but the following months nevertheless included heavy fighting on both sides, with use of bombs, rockets, artillery and air power. The situation in the Occupied Palestinian Territories, at least during certain periods of 2002, is another concrete example.

It seems evident that military operations can also occur after the occupation phase has begun. In these circumstances one is then faced with the question of which body of law should regulate the conduct of the military - IHL or human rights law. In other words, one must decide whether the use of force is governed by the law enforcement model or the conduct of hostilities model.

The easiest and perhaps most obvious solution would be to say that the law enforcement model should generally be used during occupation, and can be temporarily replaced by the IHL model whenever full-scale military operations occur, only in order to regulate the specific actions taking place as part of the military operation.

There are however practical problems of application, and theoretical solutions do not always fit neatly into reality.

This can be illustrated by the example of demonstrations that escalate into violent confrontations (such as have been said to occur in Fallujah, or in the Occupied Palestinian Territories). According to the above, initially, one would expect the law enforcement model to govern the actions of those troops in the vicinity of the demonstration. Indeed, this model would be more than adequate for dealing with a fairly peaceful protest march. However, when the nature of the circumstances change, so might the suitability of the rules. For instance, the demonstration may start to become violent, initially with individuals hurling stones, and then later with members of armed groups appearing from within the crowds, using automatic rifles and explosive projectiles. At this stage most of the civilian crowd is likely to have dispersed, but many will still be in the area, and at the same time, the military is now in the midst of a gun-battle with members of armed groups. Are they to continue using the rules of law enforcement, or should the perhaps more appropriate IHL rules on conduct of hostilities now be used? Once again, the theoretical response may well be that the law enforcement model should apply initially, but once the gun-battles break out, it is the IHL model that will apply. Whether or not the use of less-lethal weapons is made before live ammunition (a question of particular relevance to dispersal of demonstrations), is another area in which the two models differ.

On a practical level, "switching" rules is however not that simple. Soldiers are trained to act in accordance with a specific set of rules of engagement (ROE), and are not usually accustomed to having the ROE change at short notice while in the middle of an operation. The relation between the ROE and the choice of model for regulating force, is perhaps best exemplified in the case of the two Intifadas.

At the time of the first Intifada, in the late 1980s, Israeli soldiers were given a small booklet containing the instructions for opening fire, and soldiers serving in the Occupied Palestinian Territories were trained accordingly. The instructions for dealing with suspects were roughly as follows: requesting the suspect to stop; if he doesn't, then to fire in the air; the next stage is shooting towards the legs; lethal fire-power was only a last resort in face of real threat. This in general terms, follows the law enforcement model. During the second Intifada, during which there was violence on a much higher scale, the issued instructions were different. Soldiers did not receive a similar instruction booklet: the ROE were

adopted more flexibly, seemingly to allow precisely for more appropriate ones to be used during heavy fighting. In practice however, according to testimonies, the ROE given to soldiers during the second Intifada, often allowed the use of force beyond the restrictions of the law enforcement model, even in situations which did not call for it, and lethal firepower was used in situations it should not have. There were also reports of soldiers not always receiving clear instructions, and not knowing what their ROE actually were. In fact, it was claimed that in many cases junior commanders were making their own assessments of circumstances, - determining and often changing the ROE.

Allowing commanders in the field to change the ROE - to switch from the law enforcement model to the IHL conduct of hostilities model - according to circumstances, can clearly lead to confusion among the soldiers and to a greater risk of inappropriate use of firepower and heighten the chance of unnecessary force being used. It also creates difficulties in terms of the training given to soldiers preparing for their missions. Law enforcement and conduct of hostilities each require different practical training and a different mindset. Indeed, it is claimed that one of the reasons for some of more questionable actions in Iraq, is that soldiers have not necessarily been given the adequate training under the law enforcement model which is meant to regulate much of their behaviour. On the other hand, the law enforcement model training, is less likely to have been suitable for some of the battles raged between U.S. forces and insurgents.

In conclusion, the two models on the use of force must be differentiated. In times of occupation, the law enforcement model is expected to regulate most daily activities. However, the situation may sometimes change, and circumstances may dictate the need for the IHL conduct of hostilities model to prevail. How to ensure that the IHL approach to the use of force is used only when absolutely necessary, and that soldiers are adequately trained and able to distinguish between the models and when to use them, is a difficulty not easily solved.

2. Respect of social and cultural rights under occupation

Economic, social and cultural rights, although occasionally perceived as somehow inferior to civil and political rights and consequently neglected, are in fact an equal set of rights, and discussion of human rights in times of occupation must also tend to this issue. If anything, in reality, people living under occupation are more often primarily concerned with the practical necessities of

life, such as health, education, and employment, particularly during prolonged occupation.

In the relevant reports and findings on the applicability of human rights law in occupied territories, economic, social and cultural rights are not usually excluded. On the contrary, the UN Committee on Economic, Social and Cultural rights (CESCR) has clearly stated that these rights must be respected in times of occupation. Moreover, the ICJ in its recent Advisory Opinion has confirmed the applicability of this set of rights during occupation.

The next question that arises is that of determining how to implement them. Although they may well be equally important, they can not always be implemented in the same way as civil and political rights. Certain problems are raised by the attempt to fulfil the obligations of economic, social and cultural rights in occupied territories.

In terms of applicability of civil and political rights, two concepts can be used: derogations and *lex specialis*. Can the same approach be taken with economic, social and cultural rights?

The International Covenant on Economic, Social and Cultural Rights (ICESCR) does not contain a clear derogation clause as appears in the ICCPR. The provision having the most similar effect is Article 4, which allows a limitation of the rights provided by the Covenant for the purpose of promoting general welfare in a democratic society. This general statement is not at all the same as the derogation clause of the ICCPR, in substantive or procedural terms. The ICESCR also speaks of progressive measures, but this is generally seen as a way of not placing impossible burdens on the shoulders of countries without adequate resources, and to allow them to progress at a realistic pace towards maximum fulfilment of the rights - a concept very different from derogation in times of emergency, as appears in the ICCPR.

If the concept of derogation does not appear, can it be concluded that economic, social and cultural rights must always apply in full, also in times of military occupation? First we must see whether the *lex specialis* doctrine might be of assistance.

IHL includes numerous provisions dealing with economic and social issues, such as the protection of medical facilities or the provision of medical supplies. Under

IHL, the occupier has, for instance, responsibilities with regard to the health of the population in the occupied territories. One might therefore argue that since IHL contains specific rules on this, all questions of the right to health must be interpreted in light of the laws designed especially for occupation, i.e. the IHL rules. However, with regard to many of these rights, as is seen in the case of the right to health, IHL does not contain the necessary specifics for understanding what the obligations actually mean. Human rights law, on the other hand, has detailed explanations on the content of the obligations - the CESCR's General Comment goes into details on the kind of health that must actually be provided: they describe prenatal and postnatal medical treatment or immunisation programmes, and so on. If in order to clarify the content of the obligations one has to turn back to human rights law, it becomes difficult to argue that IHL is the *lex specialis*.

If then we say that in times of occupation, economic, social and cultural rights are applicable as they appear in international human rights law, must they apply fully or is there nevertheless a lesser obligation in time of military occupation?

Under human rights law, there is an approach which divides obligations into three levels: respect, protect and fulfil. Regarding economic and social issues, it must be noticed that the "respect" and "protect" elements are very similar to the ones stipulated under IHL - e.g. ensuring the safety of medical facilities. The positive obligation of "fulfil" (e.g. what level of health services must be provided) is however tackled differently in the two bodies of law.

Under IHL, Article 38 of the 4th Geneva Convention states that aliens in the territory of a party to the conflict must be given the same health care as nationals of the State they are in. This provision however, concerns those who are in the territory of the other party, and not the population of occupied territories; there is no similar provision in the sections covering occupied territory. It seems therefore that under IHL, the occupier is not obligated to provide the occupied with the same level of healthcare as is available within its own borders. Under human rights law, on the one hand, there is no clear provision allowing for lesser healthcare in occupied territories. On the other hand, it is clear that there may be practical constraints that would be a barrier to setting up health and education systems in the occupied territories that replicate those of the state itself. Seeing as military occupation can come about (at least theoretically) as a result of a war of self-defence in which the occupier is not the aggressor, and is meant to be temporary, one might also question whether the occupier must

necessarily be obliged to raise the standards and invest resources in health and education, beyond what already existed in the occupied territories. In the case of Israel and the Occupied Palestinian Territories, the prolonged occupation and the existence of Israeli settlements receiving high standards of health and education, raise further complexities which at the end of the day are likely to point towards justified demands that Israel has clear obligations to raise the standards of health, education and other economic and social rights in the Occupied Territories. An additional difficulty concerns the question of what happens when occupation ends, if the occupier was able to fulfil a higher standard than the government of the occupied territory was able to provide before and after the occupation. If for example the occupier would actually fulfil its obligation to provide healthcare to the highest standard possible, then after withdrawing, the level of healthcare might decrease to the level it was before the foreign administration, which could be construed as infringing upon the principle of retrogressive measures - ending the occupation could result in some aspects of economic and social rights actually worsening.

To summarise this section, the question of derogation or restrictions on economic, social and cultural rights is of particular importance. How can one derogate without a specific derogation clause? What is the minimal level of fulfilment that the occupying power is required to provide? These questions do not yet have clear answers.

Conclusion

The issues tackled above, the use of force and the obligations of economic, social and cultural rights in times of occupation, are not just theoretical issues. The relationship between IHL and human rights law in times of occupation has practical aspects which demand answers. The issues raised here are but two of the actual challenges, amongst many others, that the military and human rights NGOs must face in the specific context of occupation. More importantly, the answers to these questions have direct and concrete implications for the lives and welfare of those living under military occupation.

Question-Time: Applicability of Human Rights Law in Situations of Occupation

Concerning the issue of non-derogability of economic, social and cultural rights, is it not true that they are of an inherent flexible nature due to the way they have been formulated?

Indeed, article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for a progressive realisation of those rights, in accordance with valuable resources. In practical terms, this leaves room to apply certain limits to the rights in order to fit the reality and the restricted resources that are at the occupying power's disposal. Therefore, it seems that the question is not whether you can limit the rights, but rather how to prevent those in charge from abusing of Article 2.1 ICESCR. Placing the emphasis on the non-derogable character is not necessarily the best way to address this issue since there is already an inherent limitation in the rights themselves in the way they are formulated in the Covenant. The problem could be that the States do less than they actually can.

Mr. Lubell agrees with the opinion on the fact that there is room for limitation through Article 2 ICESCR. He does not think however that it solves the problem of "non-derogability". Article 2 ICESCR provides for a "progressive" realisation of the rights protected. It means that the States must do the maximum they can. The concept of "maximum" is difficult to qualify and obviously, States often do less than they could do. For instance, the US government could certainly improve the level of health services in Iraq, if it wanted to. Mr. Lubell then asks the question of whether it is desirable that the occupying power does the "maximum". He thinks that there will still be a problem.

Prof. Bothe took to the floor to contribute to the clarification of the notion of "progressive realisation" of economic, social and cultural rights. In his opinion, the notion refers to a progressive realisation under the specific circumstances of occupation which is different from peace time. There are however certain core obligations that have to be respected. (eg: preventing someone from seeing a doctor is a violation of the right to health, and no "progressive realisation" can be here relied on).

Prof. Sandoz asks whether it can be hoped that rules related to economic, social and cultural rights be more precise. As a matter of fact, those rights are also

poorly applied in peacetime. In a context of armed conflict, the specificity of the situation encourages a better respect of those rights and rehearses the level of the country. That leads to the paradox that when conflict ends, the level of welfare in the State concerned often declines. On Prof. Sandoz's opinion, the responsibility of the occupying power is not as clear. There are sets of rules which may be invoked to support such responsibility, but we cannot suggest that the U.S. government must implement the most sophisticated medical assets in Iraq. It is a question of good faith.

How can we understand the concurrent applicability of IHL and HRL?

It must be recalled that Human Rights obligations are not absolute in the sense that most of them contain limitation clauses. It is therefore necessary to see whether IHL fits into these limits. For instance, and provided that the European Convention on Human Rights applies, on the right to property. Article 53 of the IVth Geneva Convention applies to the destruction of property during occupation, justifying it by reference to imperative necessity. We could wonder whether IHL can be considered as a limitation to the right to property under the first Protocol to the ECHR. This reasoning seems more acceptable than the one based on *lex specialis*.
However, Prof. Sandoz disagrees because he does not think there is a contradiction between concurrency of IHL and HRL, on the one hand and the concept of *lex specialis*, on the other. If IHL is a lex specialis that means it can not be clarified by HRL. For instance, with regard to the right to life in times of conflict, one must refer to IHL. It does not prevent one, however, from consulting HRL to clarify certain rules when necessary.

The relationship between IHL and HRL is often sensitive. Can we consider that HR experts have sufficient knowledge of the specificities of conflict situations to be taken seriously by the military?

Mr. Ross underlines that he can only speak for *Human Rights Watch (HRW)* - that was the first Human Rights organisation that took on IHL issues and tried to do it the best and the most seriously it could. He would like to think that the military community takes it seriously when they raise these kinds of questions. *HRW* does not look at these issues from a HRL perspective; they rather try to understand IHL issues as well as possible.

In terms of military relationship, Colonel Phelps recalls one of the things he is used to stress when he does training to the military corps: they must not be afraid of international organisations, especially the ICRC which has a recognised role in the Geneva Conventions and is there to help. The same works for organisations like *HRW* or *Amnesty International (AI)* because their criticism and input can help the military to improve the situation and the quality of their work. Dialogue with those organisations is very positive and it is incumbent upon the HR community to respect and work in a cooperative spirit with the military. There is a lot of suspicion on both sides. However, we can not forget that the final goal is to protect Human Rights and to conduct an occupation in accordance with the law.

A representative of SHAPE, recalls that NATO is very actively engaged with the ICRC in all aspects. NATO trains its soldiers in the law regulating the use of force and judging by the incidents' rate, it can be said that they have been well educated. Regarding the detention issues, NATO's policies provide that it is possible to detain personnel but with the view to hand them over at the earliest possible convenient time to the proper national authorities. They try to abide by this very carefully.

Mr. Lubell states that the "IHL community" may be very resistant to Human Rights. The opposite is also true. The HR community needs certainly to be more aware of what the military necessities are and how IHL works. Many organisations are becoming better at it. *HRW* for instance take on IHL seriously and makes a really good job of it. HR organisations are learning more about IHL but IHL people need also to learn more about HRL. Mr. Lubell does not think that these two completely different bodies of law should be regulated together because they have different approaches, rules, languages and concepts. We should however find a way to use them side by side, and this is a great challenge.

Prof. Mikos-Skuza finalises the debate by emphasising that the only thing not controversial about the complex relationship between IHL and HRL is that they should be read complementarily. In case of overlapping, the crucial task is to find the ways of practical applications of these principles.

Does the Law of Occupation Preclude Transformational Developments by the Occupying Power?

Ms. Lindsey Cameron

Introduction

There is no simple, singular answer to the question whether the law of occupation precludes the occupying power from undertaking transformational developments in an occupied country. The answer will rather vary according to two elements: the content of the concept of "transformational developments", and the occupied territories that are at stake.

The basic premise of the law of occupation is that it is intended to preserve the *status quo* in the occupied territory. It is designed for temporary situations, and will keep that nature even if it lasts for thirty or forty years. Consequently, the occupying power has to exercise its rights and obligations in a way that respects the laws in force in the country. At first glance, then, it would seem that the law of occupation does preclude transformation of an occupied territory. However, there are some exceptions to this.

As a preliminary issue, it is important to point out that the debate is taking place at two levels: whether the law *should permit* transformation, and whether it *actually permits* it.

1. Comments on the debate whether the law of occupation should allow transformational changes

The fundamental premise that the law of occupation should preserve *status quo* is being called into question by supporters of the view that transformational changes should be permitted in certain circumstances.[42] This is particularly the

42 Please see, in particular, David Scheffer, "Beyond Occupation Law" 97 AJIL (2003) 842.

case in situations of "regime change" or humanitarian intervention. Indeed, some argue, if the aim is to change the regime, it would be nonsensical to apply international humanitarian law in a manner that confines the occupied territory to the *status quo*.

Although beguiling, there are problems with this argument. First, the argument that the purpose of an occupation/invasion (*e.g*. regime change) should influence the law applicable to the occupying force mixes up *ius ad bellum* and *ius in bello*. It is a key principle of IHL that the reasons for entering into an armed conflict or the legitimacy of that conflict (the *ius ad bellum*) may not be used to interpret the laws that apply to the parties to the conflict (the *ius in bello*). This fundamental separation between the two bodies of law is just as relevant in a situation of occupation as it is during the conduct of hostilities.[43]

Second, it has been argued that the distinction between UN peacekeeping operations and a unilateral mission of "regime change" by a State or a group of States, as far as sweeping changes in the administered territory are concerned, is illogical. The supporters of that theory maintain that in both cases the purpose is the same; therefore, the law should not govern one situation differently from another. However, this argument too easily casts aside the fact that peacekeeping operations, such as UNMIK, are established in conformity and respect of international law and with the consent of the territorial State, even though the mandate is based on Chapter VII of the UN Charter.[44]

Consent is a paramount factor: it is a clear, objective and verifiable measure of whether the law of occupation is applicable to a given situation. In any conflict, parties always question the reason for going to war or being involved in a

43 This principle was established with respect to occupation by the US Military Tribunal at Nuremberg in *Wilhelm List et al*, 8 July 1947 - 19 February 1948, *Law Reports of Trials of War Criminals*, vol. VIII (The United Nations War Crimes Commission) at 34 - 76: "[W]e desire to point out that international law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory." *Protocol [No. I] Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 U.N.T.S. 3 - 434 at preambular para. 5 confirms the general principle.

44 Note, however, that the existence of consent to peace operations also established under Chapter VII of the UN Charter is controversial. For those who believe there was consent to UNMIK in Kosovo, see, for example, Stephen Ratner, "Foreign Occupation and International Territorial Administration: The Challenges of Convergence" 16 *EJIL* (2005) 695; for those who believe consent was deficient, see *e.g*. Enrico Milano, "Security Council Action in the Balkans: Reviewing the Legality of Kosovo's Territorial Status" 14 *EJIL* (2003) 999. With regard to UNTAET in East Timor, see the *Report of the Secretary-General on the situation in East Timor,* UN Doc. S/1999/1024 (4 October 1999) at para. 25 and Ratner, *ibid*.

conflict. If we base the determination of the law applicable on the motives of the occupation, IHL will never be clearly applicable.

Third, many of those who argue that the law of occupation should be changed to permit greater transformation by an occupying power have a tendency to interpret extremely narrowly the "transformational changes" that the law actually allows. In particular, they assert that the only changes permitted are those based on "military necessity". However, this is incorrect. A careful analysis of the relevant provisions, particularly Article 43 of the 1907 Hague Regulations and Article 64(2) of the 4th Geneva Convention of 1949 (GC IV)[45] will clarify the extent of legislative change permitted.

2. Does the law of occupation actually permit transformational changes?

Article 43 of the Hague Regulations states that "The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

Firstly, the occupant must respect the "*laws in force in the country*", unless absolutely prevented. In practice, this includes the constitution, statutes and laws, international conventions and treaties, but also, in common law countries, the jurisprudence. The institutions in place are also caught by this phrase - since institutions are created by law: if one can change the law, one can change the institutions.[46] Nevertheless, the bar remains fairly high due to the necessarily temporary nature of occupation, but there is not an absolute prohibition.

Secondly, the notion of "*absolutely prevented*" is hard to define and "has never been interpreted literally."[47] Article 64(2) GC IV softens it, referring to "provisions which are essential…". It implies that the occupying power cannot

45 Art. 64(2): " The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

46 Marco Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers" 16 *EJIL* (2005) 662.

47 Ernst H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Buffalo: William S. Hein & Co. Inc., 2000) (reprint of the original 1942 edition) at 89.

make changes on a whim and that the concept is rather used as a kind of yardstick, though no specific test is provided.

Finally, "*public order and safety*" must be ensured by the occupying power. It is important to point out that the French version, which is the original and authoritative text, includes the words "*l'ordre et la vie publics*" . The "*vie publique*" concept is much broader than "safety" and includes every transaction that makes daily life possible in a country. That means that an occupying power has greater responsibility, but it gives also a wider scope for change in its administration of the occupied territory than "military necessity". This broad interpretation is confirmed by Article 64(2) of the GC IV - "*to maintain the orderly government of the territory*".

It is unanimously agreed that an occupying power may legislate in order to ensure its own security. However, "security" is becoming a broad concept and it is important to set limits here. The notion that poverty and unemployment are factors that contribute to general insecurity may not be used to justify transformation of an economy to a free market system. In addition, the security in question is the security of the occupying power within the occupied territory, and not the territory of the occupying power at home.[48]

"Security" refers to the security of the forces of the occupant, but it also encompasses the security of the local population. This may entail the introduction of measures such as curfews, laws on assembly, bearing arms, etc. An example of legislative changes for security purposes is the Order of the Coalition Provisional Authority (CPA) in Iraq to increase the penalties of certain crimes as a mechanism of deterrence.[49]

Furthermore, an enemy government itself may in some cases be changed because its very existence threatens the security of the occupying power in the territory. For instance, some interpret the de-Nazification of the German

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48 In a recent advisory opinion, the International Court of Justice dealt with security measures taken in an occupied territory under the rubric of the right of a State to self-defence and the doctrine of necessity. With all due respect, that problem may have been more appropriately addressed from within the framework of IHL. Please see ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep (2004), especially paras. 138 - 142.

49 See CPA/ORD/10 Sep 2003/31, *Modifications of Penal Code and Criminal Proceedings Law*, sections 3 - 5. Conversely, as Marco Sassòli points out, the modifications to bail arrangements introduced by the same law are likely not in conformity with human rights law and are therefore unlawful. See Sassòli, *supra* note 5.

government after the Second World War in this light.[50] Nonetheless, any such changes to the government must respect Article 54 of GC IV with regard to changes to the status of civil servants.

Finally, Article 64(2) GC IV could hardly be more specific: the occupying power may legislate or change laws in order to fulfil its obligations under IHL. This provision obliges one to refer to the specific obligations enumerated in the Conventions to gauge the changes permitted. In particular, the prohibition against discrimination, ensuring the proper functioning of the education system and facilitating health care are some examples of the clear obligations to be met by the occupying power.[51]

The fact that human rights law applies in an occupied territory alongside IHL has been affirmed by the International Court of Justice and other human rights bodies.[52] What remains an open question, however, is whether it would be lawful for an occupying power to change local legislation in order to implement economic, social and cultural rights as well, aside from the obligations guaranteed by the Geneva Conventions (such as the right to a fair trial and the prohibition against discrimination). That would indeed open up a wide legislative power. There is a close nexus here between changes to promote human rights and an infringement on the right of a people to self-determination.

However, with the exception of those rights specifically protected in the Conventions, the occupant is probably not obliged to legislate in order to implement Human Rights law. That being said, an occupying power would have a very good argument to say that it is "absolutely prevented" from implementing laws that clearly violate international human rights law.

Alongside with what has been said above, an occupying power may make only such changes as are absolutely necessary in order to bring the existing laws into conformity with human rights law. The classic example is that a "Common Law"

50 Some argue that it was *debellatio*, which is an obsolete doctrine entailing an end to the regime of occupation when the occupied State collapsed completely. For an original analysis of Iraq taking the doctrine of *debellatio* into account, please see Wolff Heintschel von Heinegg, "The Rule of Law in Conflict and Post-Conflict Situations: Factors in War to Peace Transitions" *27 Harv. J.L. & Pub. Pol'y* (2004) 843.

51 GC IV, Articles 27, 50 and 56.

52 The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, ICJ Rep (1996) at para. 25; Legal Consequences of the Construction of a Wall, supra note 7 at paras. 105 - 108; Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11 (31 August 2001) and General Comment No. 31 [80]: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (26 May 2004) at para. 11.

occupying power confronted with an inquisitorial criminal system in a civil law country may not be replaced by an adversarial system to meet human rights standards. As part of the argument that the law of occupation should change to allow for sweeping changes, some lament that the occupying power may only "tinker at the margins"; however, if "tinkering at the margins" brings a law into compliance with human rights, there is no reason to do more. Such a restriction is entirely unproblematic - in fact, it serves to protect the right to self-determination.

3. Derogation from the regime IHL prescribes permitted by a UN Security Council resolution

A final issue is to determine whether the UN Security Council may permit more extensive transformational changes by authorising a greater scope for legislative change than IHL provides.

One view is to assume that IHL as a whole, including the law of occupation and particularly Article 43 of the Hague Regulations, is *ius cogens*, *i.e.* imperative norms of international law. As such, since it is generally agreed that the Security Council cannot derogate from *ius cogens*[53], then it could perhaps not change the regime of the law of occupation.

This view raises various questions on the content of the notion of *ius cogens*. It is arguably preferable to consider each norm separately, rather than presuming that all of IHL is *ius cogens*. In the *Bosnia Genocide* case, the litmus test proposed by *ad hoc* Judge Lauterpacht, in order to find out whether a given norm is an imperative norm, was to ask whether one can imagine the Security Council adopting a resolution obliging States to violate that norm.[54] For example, one cannot imagine the Security Council adopting a resolution that obliges States to commit genocide.

If, for the purpose of this debate, one applies this test to the law of occupation, one cannot imagine the Security Council adopting a resolution that obliges occupying powers to treat people inhumanely. However, it is easy to imagine a resolution that authorises or obliges the occupying power to deviate from the

53 See Aleksander Orakhelashvili, "The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions" 16 *EJIL* (2005) 88.

54 Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), Further Requests for the Indication of Provisional Measures, Order (13 September 1993), Separate Opinion of Judge Lauterpacht, ICJ Rep. (1993) 407 at 440, para. 100.

regular regime of legislative powers, to protect the population. Resolution 1483 is a very good example of this.[55]

Nevertheless, if the Security Council does derogate from the law of occupation, it must do so explicitly - an encouragement to "promote economic reconstruction" cannot be interpreted as free rein to transform the economy into a free market system. The resolution must clearly state the rights and obligations of the occupying power.

Conclusion

Certainly, the law of occupation as it exists today does not permit wholesale transformation of the political, economic and/or social system of the occupied State. Nevertheless, it is crucial to emphasise that this law is a fairly flexible and nuanced instrument that does not need to be changed. It remains indeed adapted to contemporary international relations.

55 SC Res. 1483 of 22 May 2003.

Collegium, No.34, Autumn 2006

Les principes fondamentaux du droit international et les limites aux transformations dans les territoires occupés

Prof. Jorge Cardona Llorens

Introduction

Cette contribution porte sur les rapports entre le droit de l'occupation et les transformations qui peuvent être réalisées dans les territoires occupés. Bien que le siège de la matière se trouve à l'article 43 de la Convention IV de La Haye de 1907, le point de départ proposé est celui des principes fondamentaux du droit international. En effet, ces principes doivent être respectés en toutes situations, et ce y compris durant une occupation.

Dans un premier temps, nous aborderons la question de savoir si la puissance occupante a le droit, et surtout le devoir, de mettre en œuvre une administration qui intervienne au moyen de mesures législatives afin de garantir les droits fondamentaux de la population locale. Il faudra ensuite déterminer si cette même puissance occupante peut adopter des mesures transformationnelles afin de garantir sa propre sécurité. Nous conclurons sur le caractère temporaire de ces mesures qui ne peuvent en aucun cas transformer la structure politique, économique, sociale et culturelle du territoire occupé.

1. Le droit (devoir) de l'occupant de garantir les droits de la population locale:

En temps d'occupation, l'un des premiers principes qui vient à l'esprit est celui du droit des peuples à disposer d'eux-mêmes. Ce principe, consacré dans la Charte des Nations Unies et réaffirmé par la résolution 2625 (XXV) de

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56 Référence Résolution 2625

l'Assemblée générale[56], a été réaffirmé par la Cour International de Justice (CIJ), notamment dans son avis sur le *Sahara Occidental*[57] , et dans les affaires *Namibie*[58] et *Timor Oriental*[59]. Dans ce dernier arrêt, la Cour a même précisé que le droit des peuples à disposer d'eux-mêmes est un droit opposable *erga omnes*.[60] Dans l'avis sur le *Mur*[61], la CIJ a reconnu l'application de ce principe en "toutes circonstances", et particulièrement dans une situation d'occupation.

Un second principe mérite également une attention particulière, à savoir celui de la souveraineté permanente des peuples sur leurs ressources et leurs richesses naturelles comme *"élément fondamental du droit des peuples et des nations à disposer d'eux-mêmes"*[62]. Ce principe bénéficie directement et exclusivement aux peuples avant leur accès à l'indépendance, afin d'assurer la sauvegarde des droits futurs de la collectivité et d'empêcher l'exploitation coloniale. L'Assemblée générale des Nations Unies a reconnu l'applicabilité de ce principe aux peuples soumis à un régime d'occupation, et l'a réaffirmé directement en relation avec la souveraineté permanente du peuple palestinien occupé, la situation de Jérusalem-Est et celle de la population arabe du Golan syrien.[63]

Enfin, il est important de rappeler l'article 1 de la Déclaration sur le droit au développement, adoptée par l'Assemblée générale le 4 décembre 1986.[64] La disposition prévoit que le respect du droit au développement impose aux autorités territoriales, entre autres, les obligations suivantes:

- l'obligation de promouvoir le droit à la nourriture et à l'eau potable;
- l'obligation de lancer et appliquer des stratégies qui permettent d'assurer l'exercice du droit au logement;
- l'obligation de prendre des mesures législatives et autres mesures raisonnables, dans la limite de leurs ressources, pour assurer progressivement la réalisation du droit aux soins de santé;
- l'obligation de garantir le droit à l'éducation en tant que facteur indispensable du développement politique, social, culturel et économique de tous les peuples.

57 Réf. Arrêt Sahara occidental
58 CIJ, 2106.1971, Conséquences juridiques pour les États de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest Africain) nonobstant la Résolution 276 (1970) du Conseil de Sécurité, Avis consultatif, C.I.J. Recueil 1971, p. 54.
59 Réf. Arrêt Timor Oriental
60 Affaire de Timor oriental (Portugal c. Australie), arrêt, C.I.J. Recueil 1995, p. 102, par. 29.
61 CIJ, 09.07.2004,Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, Avis consultatif, C.I.J. Recueil, 2004, par. 106
62 Résolutions 1314 (XII) et 1803 (XVII).
63 Résolutions 57/269, 58/229, 59/251.
64 Résolution 41/28.

Il faut préciser que le droit au développement ne se compose pas seulement d'une série de droit économiques et sociaux (*ex*., droit à la nourriture, à l'eau potable au logement); il implique également une série d'obligations dans le chef des pouvoirs publics qui doivent y assigner les ressources techniques, économiques et humaines suffisantes. Par conséquent, la mise en œuvre du droit au développement, comme élément du droit des peuples à disposer d'eux-mêmes, nécessite l'intervention d'une administration chargée de mener à bien ces fonctions. De plus, cette administration relève de la responsabilité des autorités territoriales.

Dès lors, il est important de déterminer qui est l'autorité territoriale dans un territoire occupé. Selon le droit international, la puissance occupante est en droit de se conduire comme une autorité territoriale vis-à-vis des personnes et des biens situés sur le territoire occupé. Ainsi, la CIJ n'a pas manqué de préciser que c'est "*l'autorité effective sur un territoire, et non la souveraineté ou la légitimité du titre, qui constitue le fondement de la responsabilité de l'État*".[65] A partir du moment où l'occupant détient un pouvoir légal, il doit l'exercer conformément aux dispositions de droit international, endossant ainsi, vis-à-vis des personnes, des biens et des activités placées ou exercées sur le territoire occupé, la responsabilité d'une autorité territoriale.

Par conséquent, si la puissance occupante exerce les fonctions d'autorité territoriale, elle a l'obligation de respecter le principe du droit des peuples à disposer d'eux-mêmes et, par voie de conséquence, celle de mettre en œuvre une administration efficace.

2. Le droit de la puissance occupante de garantir sa sécurité:

Il ne faut cependant pas perdre de vue que l'occupation est une situation spéciale : le droit de l'occupation y est dès lors la *lex specialis*. Tel est le raisonnement de la CIJ lorsqu'elle affirme que le droit de l'occupation est la *lex specialis* des règles internationales des droits de l'homme.[66]

De même, il est important de préciser que le concept de *lex specialis* peut avoir diverses significations. En termes de droit de l'occupation, la *lex specialis* détermine le contenu des concepts juridiques indéterminés qui peuvent exister

65 Opinion consultative sur la Namibie, *op.cit.*
66 Affaire du Mur, op.cit.

dans les règles générales applicables[67], sans exclure l'application de la règle générale. Il faut rappeler à ce titre les affirmations de Martii Koskenniemi dans le cadre de la Commission de droit international: "*l'essentiel du droit international général a un caractère dispositif, c'est-à-dire qu'il peut y être dérogé par la lex specialis, dans certains cas toutefois, le droit général interdit expressément une dérogation, ou pareille interdiction se déduit de la nature du droit général. Le cas le plus connu est celui du ius cogens. Mais il y a d'autres types de situations dans lesquelles toute dérogation est interdite. Les éléments pertinents à prendre en considération sont par exemple les bénéficiaires de l'obligation et la question de savoir si la dérogation pouvait être interdite - par exemple, dans les cas où elle pourrait rompre l'équilibre instauré par le traité général entre les droits et les obligations des parties.*" Cette situation est clairement celle d'une occupation.

Afin de comprendre dans quelle mesure le droit de l'occupation, en tant que *lex specialis*, peut limiter le développement du peuple occupé, il est important de signaler l'une de ses caractéristiques les plus importantes: l'incorporation dans ses dispositions de la nécessité militaire. Cet élément important permet de dépasser la contradiction entre la protection des droits et des intérêts de la population civile et la nécessité militaire. Pareillement, l'équilibre entre nécessité militaire et principe d'humanité est également déterminant pour comprendre les règles de droit international humanitaire.

Ainsi, le droit du peuple occupé à disposer de lui-même doit être respecté et appliqué par la puissance occupante, sans pour autant perdre de vue la nécessité militaire qui "module" le contenu des droits du peuple occupé (à disposer de lui-même, souveraineté permanente sur les ressources naturelles, droits de l'Homme et au développement).

Cependant, il convient de faire la différence entre le fait que le droit de l'occupation, comme *lex specialis*, soit un outil permettant d'interpréter le contenu de ces droits et le fait qu'il constitue une violation ou un obstacle à l'exercice des droits du peuple occupé.

Le droit international humanitaire donne quelques éclaircissements sur la manière dont ces principes doivent coexister. On relève avant tout que la

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67 Voir les travaux de la Commission du Droit international sur «La fonction et la portée de la règle de la *lex specialis* et la question des 'régimes autonomes'» dans le cadre de l'étude sur la « fragmentation du droit international : difficultés découlant de la diversification et de l'expansion du droit international », dernier rapport à l'Assemblée générale (A/60/10, pp. 201-222).

puissance occupante a l'obligation d'établir une administration qui maintienne sa propre sécurité et rétablisse la vie et l'ordre publics.

La jurisprudence arbitrale a reconnu le "droit" reconnu par le droit international *"aux forces armées de prendre des mesures précises afin de se protéger des actes de la population civile qui pourraient léser les opérations militaires et favoriser l'ennemi."*[68]. L'article 27 de la IVème Convention de Genève reconnaît également à la puissance occupante le droit de prendre "*à l'égard des personnes protégées, les mesures de contrôle ou de sécurité qui seront nécessaires du fait de la guerre*".

Par ailleurs, la puissance occupante peut également procéder à l'évacuation totale ou partielle d'une région occupée déterminée si la sécurité de la population ou d'impérieuses raisons militaires l'exigent.

L'occupant ne peut cependant pas exercer ces prérogatives de façon arbitraire. Si tout État doit exercer sa souveraineté territoriale de manière "raisonnable" et "utile", il est évident que, dans une situation d'occupation, l'exercice de ces compétences par la puissance occupante doit être beaucoup plus limité. En tant que *lex specialis*, le droit de l'occupation vise dès lors à assurer que, malgré les besoins de l'occupant, la vie quotidienne des civils sur le territoire occupé se poursuive normalement.

Le régime de l'occupation énonce donc des règles qui ont pour but de sauvegarder non seulement la dignité et l'intégrité physique des personnes occupées, mais également leur droit au développement.[69] Ceci a été souligné par le Conseil de Sécurité à plusieurs reprises, notamment en relation avec les situations d'occupation du Sud Liban[70], du plateau du Golan[71] et du territoire palestinien[72] par Israël, l'occupation du Koweït par l'Irak[73] ou de Chypre par la

68 *Affaire Chevreau*, arrêt du 9 juin 1931, R.S.A., vol. II, pp. 1113-1143.

69 Elles établissent ainsi des règles visant à rétablir et assurer, autant que possible, le bon fonctionnement des services publics (Art. 43, Convention 1907); assurer l'approvisionnement de la population en vivres et en produits médicaux (Arts. 55 et 59 IVème Convention de Genève); maintenir les établissements et les services médicaux (Art. 56, IVème Convention); assurer la santé et l'hygiène publiques (Art. 56, IVème Convention); ou faciliter le bon fonctionnement des établissements consacrés à l'éducation (Art. 50, IVème Convention).

70 Ainsi, par exemple, la Résolution 513 (1982) ou la Résolution 515 (1982).

71 Résolution 497 (1981).

72 Par ex, résolutions 237 (1967)], 252 (1968), 267 (1969), 271 (1969), 298 (1971), 446 (1979), 592 (1986), 607 (1988), 608 (1988), 636 (1989), 641 (1989), 672 (1990), 681 (1990), 694 (1991), 726 (1992), 799 (1992), 904 (1994), 1073 (1996), 1322 (2000), 1435 (2002).

73 Voir en particulier, les résolutions 670 (1990) et 674 (1990).

Turquie.[74] Dans toutes ces situations d'occupation militaire, le Conseil de Sécurité a rappelé les obligations découlant de la IVème Convention de Genève et du Règlement de La Haye de 1907.

3. Les limites des mesures transformationnelles adoptées par l'occupant:

Si l'on admet que la puissance occupante doit mettre en œuvre les obligations dérivées du droit international humanitaire, il reste la question de savoir si elle peut, dans ce même cadre, modifier la structure politique, économique et sociale du territoire au point d'y produire des transformations substantielles.

Le droit de l'occupation *(lex specialis)* offre à nouveau une réponse en ce qu'il tente de maintenir un équilibre entre, d'une part, l'obligation de mettre en œuvre les obligations dérivées du principe du droit des peuples à disposer d'eux-mêmes, et d'autre part, la nature nécessairement temporaire de l'occupation et la nécessité de respecter la volonté du peuple.

N'étant qu'un administrateur temporaire du territoire occupé, l'occupant ne peut s'ingérer dans les structures économiques, sociales, juridiques organisationnelles ou démographiques de la société occupée (*ex*., interdiction de détruire des biens mobiliers ou immobiliers sauf en cas d'opérations militaires rendues "absolument nécessaires" - article 53 IVème Convention de Genève). Par ailleurs, en ce qui concerne la propriété publique, l'occupant n'est pas considéré comme administrateur et usufruitier des bâtiments publics, forêts et exploitations agricoles appartenant à l'État occupé. Il a l'obligation de sauvegarder les fonds de ces propriétés et de les administrer conformément aux règles de l'usufruit (article 55 du Règlement de La Haye).

Les résolutions du Conseil de Sécurité par rapport à Israël et les territoires occupés illustre parfaitement les règles exposées ci-dessus. A plusieurs reprises le Conseil de Sécurité a déclaré qu'il existe une obligation pour "*tous les États, organisations internationales et institutions spécialisées de n'accorder ni reconnaissance, ni concours, ni aucune aide à toute mesure prise par la puissance occupante pour exploiter les ressources des territoires occupés ou pour modifier d'une façon quelconque la composition démographique, le*

74 V. par exemple, les résolutions 365 (1974) et 367 (1975).

caractère géographique ou l'organisation institutionnelle de ces territoires. "[75] De même, concernant la question des ressources naturelles, le Conseil a réaffirmé le "*droit des États et des peuples dont les territoires sont sous occupation étrangère à la souveraineté permanente sur toutes leurs ressources naturelles*", *ainsi que l'illégalité de "toutes les mesures prises par la puissance occupante pour exploiter les ressources humaines et naturelles des territoires occupés.* "[76]

En outre, en posant clairement les limites aux transformations législatives qui peuvent être réalisées, l'article 43 du Règlement de La Haye impose de prendre "*toutes les mesures au pouvoir de l'occupant pour rétablir et assurer, dans la mesure du possible, l'ordre public et la sécurité*". Ceci devant être fait dans le respect "*à moins qu'il en soit absolument empêché*" des lois en vigueur dans le pays. Cette disposition est complétée par les articles 64 et 54 de la IVème Convention de Genève, relatifs au maintien de la législation pénale et le fonctionnement des tribunaux ordinaires.[77]

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75 Voir par exemple, les résolutions 3005 (XXVII), du 15 décembre 1972, 3092 (XXVIII) du 7 décembre 1973, 3240 A (XXIX) du 29 novembre 1974, 30/159 du 15 décembre 1975, 31/106 du 16 décembre 1976, 32/5 du 28 octobre 1977, 32/91 du 13 décembre 1977, 33/113 du 16 décembre 1978, 34/90 du 12 décembre 1979, 35/122 du 11 décembre 1980, 36/147 du 16 décembre 1981, 37/88 du 10 décembre 1982, 38/79 du 15 décembre 1983, 39/95 du 14 décembre 1984, 40/161 du 16 décembre 1985, 41/63 du 3 décembre 1986, 42/160 du 8 décembre 1987, 43/58 du 6 décembre 1988, 44/48 du 8 décembre 1989, 45/74 du 11 décembre 1990, 46/47 du 9 décembre 1991, 47/70 du 14 décembre 1992, 48/41 du 28 février 1994, 49/36 du 30 janvier 1995, 50/29 du 5 février 1996, 51/131 du 13 décembre 1996, 52/64 du 10 décembre 1997, 53/53 du 3 décembre 1998, 53/56 du 3 décembre 1998, 54/76 du 22 février 2000, 55/130 du 28 février 2001, 56/59 du 14 février 2002, 57/124 du 24 février 2003, ainsi que les résolutions 2253 (ES-V) et 2254 (ES-V), et les résolutions ES-10/3 du 15 juillet 1997, ES-10/4 du 13 novembre 1997, ES-10/5 du 17 mars 1998, ES-10/6 du 9 février 1999 et ES-10/7 du 20 octobre 2000. L'Assemblée générale a également adopté la résolution 49/43, du 9 décembre 1994, sur la situation dans les territoires occupés de Croatie.

76 A noter également, « le droit des États et des peuples dont les territoires sont sous occupation à la restitution des ressources naturelles des territoires occupés et à une pleine indemnisation pour l'exploitation, la spoliation et les dommages dont elles ont fait l'objet, ainsi que pour l'exploitation et la manipulation des ressources humaines de ces territoires ». Résolutions 3175 (XXVIII), du 17 décembre 1973, 3336 (XXIX) du 17 décembre 1974, 30/50 du 15 décembre 1975, 31/186 du 21 décembre 1976, 32/161 du 19 décembre 1977, 34/136 du 14 décembre 1979, 35/110 du 5 décembre 1980, 36/173 du 17 décembre 1981, 37/135 du 17 décembre 1982 et 38/144 du 19 décembre 1983. De la même manière, le Conseil de sécurité a fait référence à ces questions à plusieurs reprises, par exemple, en décidant, dans le cas de l'occupation des territoires arabes par Israël, "d'enquêter sur les informations relatives à la grave diminution des ressources naturelles, particulièrement des ressources en eau, en vue d'assurer la protection de ces importantes ressources naturelles des territoires occupés" [Résolution 465 (1980)].

77 Ces structures ne peuvent être altérées que dans certaines limites, sans pour autant porter atteinte aux droits fondamentaux de la défense.

Dans cette perspective, il est difficile d'accepter certaines affirmations selon lesquelles la mise en place d'un Conseil de gouvernement iraquien par l'Administration de la Coalition, l'établissement d'un système constitutionnel fédéral, l'abolition du Parti Baas et la tentative d'introduire une économie libre de marché en Irak, ne sont pas autant de violations du droit international humanitaire.[78] Il semble, au contraire, que le droit des peuples à disposer d'eux-mêmes empêche la puissance occupante de modifier le droit, mais également les institutions[79] "*à moins qu'il n'en soit absolument empêché*" (ce qui est loin d'être claire dans les exemples repris ci-dessus). Dans le cas contraire, il faudrait pouvoir justifier l'intervention de l'occupant par une autorisation de la Communauté internationale à travers le Conseil de Sécurité.

En outre, ces limites aux transformations législatives ont été affirmées par le Conseil de Sécurité par rapport à d'autres situations d'occupation comme celle des territoires arabes occupés par Israël.[80] De même, dans l'affaire du "*Mur*", la CIJ vise expressément les transformations démographiques et autres qu'une telle construction entraînerait lorsqu'elle se réfère à la violation du droit des peuples à disposer d'eux-mêmes.

Conclusion

Il ressort de tout ce qui précède que dans une situation d'occupation, un triple équilibre doit être maintenu. Le premier élément est le droit de la puissance occupante d'adopter des mesures pour garantir sa sécurité à la lumière du principe de la nécessité militaire. Le second concerne les obligations qui découlent du principe du droit des peuples à disposer d'eux-mêmes, et notamment celle de garantir une administration civile efficace qui permette le développement du peuple occupé. Enfin, le troisième élément de cet équilibre est la nature nécessairement temporaire de l'administration occupante et la nécessité de respecter la volonté du peuple occupé, ce qui l'empêche de s'ingérer dans les structures économiques et sociales, juridiques, organisationnelles ou démographique de l'État occupé.

78 Marco SASSÒLI : « Legislation and Maintenance of Public Order and Civil Life by Occupying Powers », *EJIL*, vol 16, n° 4, 2005, pp. 672-673.

79 Ibid., pp. 671-672.

80 V. par. exemple : Résolutions 252 (1968), 267 (1969), 271 (1969), 298 (1971), 446 (1979), 592 (1986), 607 (1988), 608 (1988), 636 (1989), 641 (1989), 672 (1990), 681 (1990), 694 (1991), 726 (1992), 799 (1992), 904 (1994), 1073 (1996) et 1435 (2002)

De plus, il ne faut pas perdre de vue que le droit des peuples à disposer d'eux-mêmes doit s'exercer sur la base d'une participation active, libre et significative du peuple.[81]

Le nœud du problème réside dans la confusion entre les droits des peuples et ceux de l'État. L'État, dans lequel ces peuples se sont constitués, reste normalement leur représentant et mandataire, et de ce fait doit exercer ces pouvoirs en leur nom. Cependant, lorsque ces compétences étatiques ne sont pas exercées par un gouvernement représentatif mais par un pouvoir étranger qui occupe le territoire, ce dernier devient à son tour mandataire du peuple occupé.

Naturellement, les différentes situations dans lesquelles peut se trouver le peuple occupé peuvent conduire à des modulations dans la mise en œuvre desdits droits. C'est pour cette raison que le droit de l'occupation doit être considéré comme *lex specialis* lors de l'interprétation du contenu de ces droits. Moduler ne signifie cependant pas entraver l'exercice, particulièrement lorsque des principes fondamentaux opposables *erga omnes* (et donc n'admettent aucune dérogation) sont en cause.

Question-Time: To what Extend Does the Law of Occupation Preclude Transformational Developments in Occupied Territories?

Peut-on considérer que le droit de l'occupation est lex specialis et de ce fait exclu l'application d'autres régimes?

Le Prof. Cardona Llorens se réfère aux travaux en cours de la Commission de Droit international des Nations Unies sur cette question pour en remarquer la complexité. Selon lui, la *lex specialis* ne doit pas être considérée comme la règle particulière qui prime sur la règle générale, mais plutôt comme l'outil qui permet de définir le concept indéterminé de la règle générale. C'est en tout cas ainsi que la Cour internationale de Justice l'a défini dans son avis relatif au *Mur*. Les concepts juridiques flou du droit des peuples à disposer d'eux-mêmes et du droit au développement sont concrétisés par la *lex specialis* qui s'applique dans une situation concrète. Lorsqu'il s'agit d'occupation, une situation coloniale ou une administration internationale, le Prof. Cardona Llorens pense que le droit de

81 Préambule de la Déclaration du droit au développement.

l'occupation doit être considéré *lex specialis* puisqu'il contribue à une meilleure interprétation des Droits de l'Homme en tenant compte des particularités propres à une situation d'occupation grâce à l'introduction du la notion de "nécessité militaire".

S'il est vrai qu'il est du devoir de la puissance occupante de garantir le droit des peuples à disposer d'eux-mêmes, est-ce que l'organisation d'un référendum constitutionnel n'est pas seulement permis, mais également requis par le droit de l'occupation?

Le Prof. Cardona Llorens estime qu'il faut avant tout déterminer si l'organisation d'un référendum entre dans les droits inclus sous le principe du droit des peuples à disposer d'eux-mêmes. La réponse n'est pas claire: il faut faire une distinction entre le droit de disposer d'un système démocratique et celui de participer au système. L'administration occupante a toujours une nature temporaire et doit, par conséquent, limiter ses actions. Dès lors, il est difficile d'admettre que la puissance occupante doit intervenir dans les décisions qui sont définitives pour le peuple. D'autre part, la question de l'organisation d'un référendum dans l'État occupé soulève la question de la licéité de l'occupation elle-même: si l'occupation n'est pas licite, la décision de la puissance occupante d'organiser un référendum constitue une violation directe du droit des peuples à disposer d'eux-mêmes. Il devient par conséquent très difficile de mettre en œuvre ce droit. Si l'occupation est licite, il devient possible pour la puissance occupante d'organiser un référendum si cela est prévu par son mandat.

Determining the boundaries of what an occupying power is allowed to do in the occupied State is a constitutional question. Who will address this sensitive issue since neither the International Court of Justice nor the United Nations are willing to do so?

Ms. Cameron stresses that one of the things that we must remember is how Article 43 of the 1907 Hague Regulation is implemented. Implementation will usually take place after a while, once a sort of peace is concluded. At that time, the question of the legality of the measures taken before is duly assessed. The area where there is most controversy is for economic changes because those who argue for broader power to change say that the problem is that if they change the laws in order to get greater foreign power investment and

afterwards all those contractors invalidate it, they can do whatever they want. It is important to keep that in mind when the legality of the measures is assessed.

Prof. Cardona Llorens thinks that two different situations must be distinguished. First, the occupation of the territory by another State, and based on a determined motivation. In this case, there is only one possible legal action, that is, self-defence. Such action is of a temporary character and consequently, according to the law of occupation, transformational developments must be very restrictively interpreted. The second situation refers to a territorial occupation based on a Security Council resolution, or an international administration. In such a case, the occupation represents the interests of the international community. Therefore, a broader interpretation of the powers of the occupying State can be accepted.

Prof. de Wet has the chance of making some remarks on the UN Security Council. She thinks that we must distinguish between the occupied situations which are not regulated by a mandate (e.g. Middle East situations), and Chapter VII-types of mandate that regulate occupation (e.g. Kosovo). According to her, the legal basis makes all the difference: under a Chapter VII mandate, the intervention of the Security Council modifies the nature of the action. The situation resembles a "trusteeship", but does not fall under the "trusteeship" chapter of the UN Charter. Therefore, the alternative is to resort to Chapter VII. However, Prof. de Wet points out that such reasoning opens up a "scarily" broad ability for transformations and adoption of all kinds of measures.

Furthermore, Prof. de Wet indicates that too much emphasis should not be put on consent. Although genuine consent is extremely helpful in political terms, we can not forget that Chapter VII is inherently coercive. In her opinion, we should acknowledge that while dealing with transformation under a Chapter VII mandate, the rules change. The Security Council acts under the presumption of legality. When a measure is adopted under the mandate, States have the right to express their opposition. If they remain silent, they will be deemed to agree with the measure (acquiescence). We must look beyond *ius cogens*; it is a "good faith" issue. Prof. de Wet wants to express the view (although highly controversial) that, according to her, the Security Council creates a legitimate expectation (legal obligation) to respect certain core Human Rights norms and rules of IHL. When the Security Council authorises a transformation, those core elements have to be respected but nonetheless form an *alter* framework. Within that framework, Prof. de Wet thinks that there is a broad area within which the Security Council can legislate and transform.

Closing the panel, Mr Laurent Colassis points out that the different opinions expressed during the debate seem to indicate that transformational developments are allowed. However, the extent of those changes remains controversial and will certainly be the main subject of future debates.

Collegium, No.34, Autumn 2006

Civil Military Relations in Situations of Occupation

Mr. Manuel Bessler

Introduction

Civil-military relations are complex and sensitive. Indeed, humanitarians and the military are two different players who work in the same environment and face similar threats. However, their different objectives and approaches make their interaction on the field very challenging and raise practical questions.

The issue is even more complex when we consider the diversity of the humanitarian community itself. Despite the existence of some common principles, the organisations have different mandates, approaches and budgets that make the coordination of the humanitarian action particularly difficult.

1. Specific humanitarian considerations

The humanitarian action is grounded on defined pillars, common to the humanitarian community: the principles of neutrality, impartiality and humanity. The actual implementation of these principles is, however, much more complex in the field. The content of these notions will depend on the specificities of the situation and of the organisation.

The first issue the humanitarians must face is their identification - in order to find a way to work in a coordinated fashion. UN OCHA (*United Nations Office for the Coordination of Humanitarian Affairs)*, for instance, tries to work in partnership with these other players in order to mobilise and define a coordinated humanitarian action.

Secondly, attention must be drawn on the distinction between humanitarian assistance and military relief or civic operations. Indeed, while their primary intention is often the same - to address human suffering -, the underlying goal is different for the military: either to support the military objective or to improve the standing of the military forces (Dictionary of the U.S, Defence Department). Of course, this difference challenges the cooperation between the two communities.

The basic principles of the humanitarian action, neutrality, impartiality and humanity, are necessary to enable the organisations to perform their mandate in the field. To obtain, and sustain, access to all parties to a conflict, the humanitarians must be perceived as impartial. Assistance must be neutral, and not driven by any military or political consideration. In other words, humanitarian action must be only based on needs assessed by humanitarians independently of the party.

These principles were, and are, still valid. Most of the States acknowledge the key-role of the operational independence of humanitarian action. Assistance must be run by civilians who can move and communicate freely among them, with the media, with all the groups and parties to the conflict. The moment someone has any kind of influence on the humanitarian conditions of the population, he/she becomes an interlocutor of the humanitarian organisations.

However, the division line - the respect of the basic humanitarian principles - between humanitarians and military clearly defined in theory, is often blurred in the field.

A practical example is the situation in Afghanistan, in 2001. In the middle of American operations, an earthquake occurred in the North. The area became then an area of both conflict and natural disaster. Many humanitarians were acting in the field but the only possibility to fly up to the North was by helicopter. The American forces had them available and were able to provide them. The use of the military assets raised then a number of questions related to the respect of the core principles of neutrality and impartiality - what would be the perception of the population towards the organisation that would use the helicopters? However, the needs were imminent, and most of the humanitarians decided to use the American helicopters.

Finally, the issue of security is of particular concern. In the field, humanitarian

actors are an easy and high profile target, particularly when they work with the military. It is not always an additional security threat, but the perception of the population towards humanitarian organisations working too closely with the military may change and endanger their security.

These considerations must be kept in mind when the humanitarian community approaches the military for cooperation. This is particularly the case in times of occupation.

2. Civil-military cooperation

Cooperation, or coordination, between the military and the humanitarians should not be totally dismissed. Liaison arrangements are possible and even necessary for security reasons: humanitarian actors must know who is the military commander in whose area of responsibilities they are acting, and vice versa.

There are different types of arrangements that can be put in place. Information sharing is the most significant, although restrictions to the kind of information shared must be set. Humanitarians are particularly interested in security information, and seek the possibilities to be present at security meetings of the military. It is important for them to inform the commander on the locations of their residences, the area and the kind of their activities. Exchange of information of that kind is essential for both communities to work safely.

Civil-military cooperation could also lead to the use of military assets. The issue is however extremely sensitive as has been illustrated above with the situation in Afghanistan in 2001. How should the local population distinguish between the armed forces and humanitarian organisations if the same helicopter humanitarians used to distribute assistance, serves the next day to run a military operation? Perception is fundamental since it influences both the access of the humanitarians to all the parties and areas of conflict, and the security of their personnel.

Although it must not be strictly avoided, civil-military cooperation is a sensitive matter. When it comes to cooperate, or coordinate, with a belligerent party, the humanitarian community must consider the issue on a case-by-case basis and in a long-term perspective. Negative implications may definitely compromise a whole action.

However, differentiation between humanitarian actors and the military must remain and be clearly marked in order not to blur the basic distinction of IHL between combatants and non-combatants.

Conclusion

It is fundamental for the different actors to know each other. Aware of that necessity, OCHA and its humanitarian partners try to establish communication channels with their humanitarian colleagues and the military, not only in the field but also at the headquarters.

Both communities should encourage those contacts even for those who want to keep the distance, and where the situation requires, they will need to adopt more precautious measures, and be more creative - meetings in the mayor office, contacts by e-mail or phone. It is a matter of responsibility to know each other. Urgent needs must be promptly tackled and require better understanding. This will be only possible through previous clarification of the roles and expectations of all the actors.

Another issue regarding the civil-military cooperation is training. In that respect, the OCHA has decided to develop, as part of its mandate, "guidelines" on key matters such as the use of military assets - allowed in natural disasters or complex emergency situations -, military escorts - when to ask for that kind protection? Specific country guidelines have also been issued, like for Iraq in 2003.

These kind of initiatives seek to provide support to the humanitarian community in upholding the gap between the military and the humanitarian, while building bridges commonly accepted in order to achieve a goal which is often common: to bring assistance to the people.

Les relations entre civils et militaires

Mr. Sami Makki

Cette contribution a pour objectif de mettre en évidence les évolutions récentes que connaissent parallèlement les mondes du militaire et de l'humanitaire en raison de l'émergence de nouvelles formes de coordination. En effet, les expériences récentes en Irak et en Afghanistan, ont mis en évidence de nouvelles formes institutionnelles de coordination des relations militaires mues par de nouveaux critères, essentiellement militaires et gouvernementaux, de rationalisation.

La première partie de cet article est consacrée au phénomène de privatisation de la sécurité, notamment à la lumière de la situation en Irak, ainsi qu'aux nouveaux enjeux que pose ce phénomène en pleine expansion.

Une seconde partie traite des évolutions apparues dans le monde des relations entre les civils et les militaires, avec une attention particulière sur la question de l'intégration comme modèle d'efficacité et de rationalisation. L'objectif de cette évolution est d'arriver à une forme de consensus et de cohérence dans les modes d'actions, ce qui ne manque pas de poser de nombreux problèmes en termes de respect du droit international humanitaire (DIH) et des principes humanitaires.

1. L'émergence de la sécurité privée

L'émergence des compagnies privées de sécurité, notamment dans le secteur militaire, remonte à plus de dix ans, parfois même vingt ans s'il on prend l'exemple du Royaume-Uni. Le phénomène s'est considérablement développé en très peu de temps notamment dans des cadres très spécifiques comme la “ guerre contre le terrorisme ”.

Ce phénomène s'explique comme une forme de rationalisation de l'organisation des appareils de défense, notamment par le biais de ce qu'on appelle l'externalisation des ressources, ou *outsourcing*. Il s'agit d'un processus

économique qui vise à créer des formes de partenariat avec le secteur privé pour certains services de soutien logistique ou de maintenance.

L'émergence de cette dynamique remonte à la fin de la guerre froide qui entraîna des modifications considérables comme la contraction des budgets de défense, la réduction du format des armées et dans certains cas la " professionnalisation " de celles-ci.

A cela s'ajoute, par ailleurs, des dynamiques plus récentes qui touchent à la réforme des institutions en raison de l'apparition de nouvelles menaces.[82]

Tous ces éléments se sont agrégés pour créer des conditions particulières. Dans un cadre comme l'Irak, on est arrivé en très peu de temps à près de 20.000 opérateurs privés, soit militaires soit de sécurité. Ce type d'exemple met en évidence l'importance croissante de ces sociétés privées de sécurité dans le cadre de conflits, ce qui pose la question de la sécurité de leur personnel. En effet, ces opérateurs se mettent réellement en danger, et parallèlement, ajoutent une forme d'instabilité croissante dans le théâtre des opérations en raison du mélange qui les compose, à la fois civile et militaire.

En termes de statistiques, durant la guerre du Golf en 1991, la présence des compagnies privées de sécurité était estimée à environ un opérateur privé pour 100 militaires des forces armées nationales. En Bosnie, on a vu apparaître de nouveaux services, et le *ratio* est passé à un opérateur privé pour environ 10 soldats, particulièrement dans la phase de stabilisation ainsi que dans le long terme pour certains services de maintenance ou de constructions de base.[83] En Irak aujourd'hui, le *ratio* est de 20%, les opérateurs privés constituant le second contingent après les forces américaines.

Tout indique que cette évolution est le résultat de choix politiques très clairs. Il existe une volonté, particulièrement dans certaine culture anglo-saxonne, de repousser au plus loin les limites de l'externalisation.[84] On se rend compte que,

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82 Par exemple, l'intégration des structures du *Homeland* et du *National Security* aux Etats-Unis, regroupant ainsi les aspects de sécurité intérieure et extérieure. Ce phénomène commence également à apparaître en Europe, ex.

83 On peut citer notamment les sociétés KBR, Brown & Root, ce dernier étant chargé dans le cadre de programmes de l'armée américaine de gérer la plupart des bases américaines présentes dans les Balkans.

84 En France par exemple, il n'y a pas cet échange d'information, il y a même des tensions entre les différentes agences. Les cultures nationales sont très différentes, et il est important d'en tenir compte car cela permet de comprendre l'impact que cette transformation peut avoir sur les pays européens.

de plus en plus, compte tenu du contexte international, on tend à éliminer les barrières traditionnelles entre ce qu'on appelle les fonctions de soutien - notamment logistique - et les fonctions opérationnelles.

Très clairement, dans l'approche américaine de l'externalisation, il existe une volonté d'utiliser ces opérateurs privés comme des partenaires importants, par exemple dans la lutte contre le terrorisme. En effet, cette dynamique de privatisation de la sécurité est principalement influencée par les Etats-Unis, malgré les nombreuses divergences en matière de moyens et de stratégies. On voit également apparaître des liens très importants entre les grands opérateurs privés - *MPRI, Dyncorp, KBR* - qui se groupent depuis quatre ou cinq ans en grands complexes militaro-industriels américains. Ces groupes, auparavant indépendants, ont été rachetés par de très importantes compagnies transnationales qui proposent une grande diversité de services aux forces armées, en ce compris ce qu'on appelle la “ transformation des forces armées ” vers de nouveaux réseaux.[85]

Cette orientation soulève évidemment les plus vives inquiétudes en terme de mise en oeuvre des droits de l'Homme, du DIH.

2. Les relations entre civils et militaires

Ces nouveaux acteurs privés gagnent en importance dans de nombreux secteurs militaires, en particulier dans le cadre de services de sécurité, d'assistance technique en période de stabilisation et de post-conflit.

Une des grandes évolutions de ce secteur s'explique par la reconnaissance des compagnies privées de sécurité : elles se présentent de plus en plus comme des interlocuteurs indispensables en termes de protection. Elles sont perçues comme des agents efficaces dont les services permettent de rationaliser les coûts et d'avoir une meilleure communication avec les forces armées - par exemple, certaines sociétés assurent des services de protection pour les agents de la coopération britannico-américaine en Irak, pour certaines agences humanitaires aussi.

En effet, le personnel recruté par ces opérateurs, tout particulièrement par les grands groupes transnationaux, est hautement qualifié et se compose même

85 Un opérateur comme *L3Communications* est un partenaire important qui produit énormément de choses pour les forces américaines, britanniques et de plus en plus d'Etats européens.

souvent d'anciens membres des forces armées. Ils ont donc une grande expertise et connaissent le milieu.

Il s'agit là, d'ailleurs, de l'un des points forts de ces compagnies privées puisqu'en raison de cette “ connivence culturelle ” avec les milieux militaires - utilisation des mêmes termes, des mêmes concepts - l'échange d'information est favorisé, *a contrario* de nombreuses agences humanitaires.

Au regard des différentes expériences de terrain, on ne peut que conclure que ces sociétés militaires privées sont devenues des acteurs indispensables. Elles sont présentes partout où des forces militaires, particulièrement américaines, sont déployées.

Néanmoins, il faut être conscient du fait que cette dynamique aura des conséquences très lourdes. Compte tenu de l'évolution du contexte international, un nombre croissant de parts de marché seront gagnées par ces opérateurs privés pour des fonctions de sécurité intérieure, de logistique ou de problèmes plus spécifiques comme la gestion des réfugiés aux frontières. Ce dernier exemple est particulièrement frappant, puisque progressivement, la gestion des frontières se fait de façon automatisée, informatisée. Il s'est créé une sorte de dépendance entre le secteur public, et majoritairement les forces armées, et le secteur privé, qui s'explique en partie par l'avancée technologique que le secteur privé connait par rapport aux forces armées - production d'armes, systèmes d'observation.

A cette relation particulière s'ajoute la volonté des Etats-Unis, accrue suite aux évènements du 11 septembre, de mieux gérer la relation entre les acteurs civiles et militaires pour créer une forme plus sophistiquée de coordination. En d'autres termes, on voit apparaître une sorte de puissance intégrée.

L'expérience en Irak a permis de mieux comprendre le phénomène d'intégration. En effet, la situation sur le terrain a très vite laissé transparaître un “vide” dans la phase de stabilisation et de reconstruction du pays. Le militaire s'est vu incapable d'assurer seul l'ensemble des tâches qui se présentaient. C'est ainsi qu'est apparu la nécessité de coordonner des actions avec les acteurs civils. Le phénomène n'est pas nouveau, mais il est apparu sous une forme différente qui se rapprochait de plus en plus d'une forme d'intégration inter-agences, notamment dans le cadre d'opérations appelées "intervention-stabilisation-transformation".

Ceci est particulièrement perceptible dans le cas de la relation étroite entre les militaires et les *Disaster Assistance and Response Teams* (DARTs), équipes spécialisées dans l'aide d'urgence. Ces équipes existent depuis un certain temps, mais jouent aujourd'hui un rôle un peu différent en Irak. Elles se chargent principalement de l'échange d'informations avec les forces spéciales. Ces nouveaux groupes intègrent donc des expertises très différentes et sont capables de faire circuler l'information beaucoup plus rapidement que par des moyens conventionnels.

Cette intégration implique une totale réorganisation des relations de pouvoir entre les mondes civil et militaire. Par opposition à une simple coordination, qui repose sur un rapport plus équilibré et un respect des normes et des spécificités de chaque acteur en fonction de son engagement, l'intégration privilégie une planification avancée et par conséquent une forme de consensus sur les objectifs à atteindre.[86]

De plus le phénomène d'externalisation affecte également la façon dont le militaire perçoit sa propre mission, ce qui entraîne des conséquences importantes pour le civil.
Par ailleurs, l'intégration pose un enjeu très important, à savoir la sécurité des opérateurs privés sur le terrain.

Conclusion

Si l'on additionne le phénomène de privatisation dans les domaines militaires et civils, et la question de l'intégration, le modèle qui en résulte se présente comme rationnel, équilibré et efficace.

Cependant, il est indéniable qu'il pose de sérieuses questions en termes de responsabilité. En effet, les opérateurs privés ne répondent qu'à leurs propres règles. Cependant, s'ils ne sont pas formellement parties aux instruments internationaux, il n'en reste pas moins que ces nouveaux acteurs des conflits armés opèrent sur le territoire, et sont engagés par, des États tenus de respecter les règles de droit international humanitaire. Il serait dès lors souhaitable que la communauté internationale dans son ensemble, et les États qui recourent aux services de ces compagnies privées de sécurité, s'assurent du respect par celles-ci des règles de DIH et leur fournissent les formations nécessaires en ce sens.

86 Il s'agit avant tout d'un processus institutionnel mené à très haut niveau qui se répercute ensuite sur le terrain. L'OTAN, par exemple, privilégie une plus grande cohérence ou intégration par opposition à une simple coordination qui était considérée comme un élément de base durant les années nonantes, par exemple dans les Balkans.

Par conséquent, vu l'importance du phénomène, il est important de mettre en évidence les limites d'une gestion intégrée des crises et de réfléchir rapidement à des solutions acceptables de tous.

Question-Time: The Law Applicable to Multinational Forces in Administered Territories

"Civil-military cooperation" (CIMIC) according to NATO.

It was recalled that "Civil-military cooperation" for NATO entails "cooperation" and "coordination" among all key players: civilian, military, international organisations, non-governmental organisations and the population. NATO distinguishes two types of mission: "Article 5 operations" (war conflict) and non-Article 5 operations (peace-keeping, peace-enforcement and humanitarian assistance operations). When NATO acts under the last type of mandate it often cooperates with UNOCHA in what can be called an "integrationist" approach, because their mandates are similar. Under "Article 5 operations" however, NATO adopts another more “complementary” approach, it tries to avoid compromising the respective mandates of the organisations that it cooperates with.

Therefore, NATO intends to cooperate and to institutionalise relationships with international organisations. Currently, it is in a process of furthering its relationships with the United Nations: after having this relationship matured for the past years, NATO is finally running down the path of having it institutionalised. With the European Union, the overall idea is to cooperate and avoid the duplication of efforts, due to the fact that NATO and the EU very often use the same military means and capacities. Finally, NATO has good relations of cooperation with the NGO world, although not institutionalised so far.

In other words, it is clear that NATO adopts measures that seek to provide the desired effect for its operation. However, at the same time, it recognises the contribution of other international organisations and NGOs and tries to respect their mandate. This is the reason why NATO put such great emphasis on its interaction with civil actors.

Coordination between civil and the military actors within the EU.

Mr. Van Hegelsom points out that there is a difference between NATO's doctrine and the doctrine developed by the European Union. He perceives CIMIC as a supportive function to the armed forces. Hence, it is embedded in the command structure and it serves the goal of the military operation. The EU uses a different notion to qualify the relationship between civil and military actors: "civil-military coordination". It means that the EU works on equal footing with other partners, within and outside the EU territory. The EU uses that concept with the view of gathering all international actors towards the same goal: winning peace and rebuilding institutions.

Relationship between the civil and the military from a military perspective.

Col. Phelps explains the base line that the military starts with at least in the United States, which is the "access strategy". The core question is how the armed forces will go out quickly. The military must think of a way to get back home, but at the same time, it has to leave behind a stable society that is able to operate functionally. All these issues are tied to the "access strategy". That necessarily means that some "institution building" must be carried out: as things progress, these operations are called "stabilisation" or "peace-keeping.

Furthermore, among the multiple problems that may arise, the control of civilians is the most serious. Civilians who work for the military are easy to control since they are bound by a contract and can be fired or sent home. However, this is not the case for other private security companies that operate in conflict situations (Col. Phelps indicates that many of the private operators operating today in Iraq are referred to as "cow-boy" operators). There is no real good control over these people and the way they use force (e.g.: incidents occur in Iraq where US or Iraqi convoys have been shot with no particular reason). Private companies do not have rules of engagement and do not follow any strict training: sometimes they do not differentiate between defensive operations and self-defence. Col. Phelps says that the important issue now is to determine who is going to control all these private actors.

With regards to the "access strategy", Mr. Bessler remarks that humanitarians often precede the military in the field, and stay longer than them. Therefore, it is very important for them not to rely on military support. It must be considered as a last resort, and should be limited in time. Humanitarians must always be

aware of the fact that the military has different objectives and schedules. Furthermore, Mr. Bessler points out that he is uncomfortable with the military talking about "humanitarian" operations. It is a matter of terminology that reveals different approaches; he prefers other terms like "relief" or "civic" activities. Indeed, "humanitarian" is a very popular term, but is often misused.

Prof. Spieker expresses however a slight disagreement with Mr. Bessler. According to her, "humanitarian" qualification must be focused on the type of operation rather than on the type of actor which carries it out. The starting point is to say that the military *per se* is not a non-humanitarian actor. Provided that the action is humanitarian, neutral, impartial and maybe independent, it must be qualified as "humanitarian". Prof. Spieker notes that this is the approach that the German Government and German relief organisations, including the German Red Cross, are following.

Who takes on the responsibility for private military companies' mistakes, the military that hires them or the companies themselves?

Mr. Makki convient du manqué de clarté en ce qui concerne la responsabilité des compagnies privées de sécurité. Il existe un problème réel de contrôle de ces compagnies, mais en même temps il n'est pas sûr qu'il y ait une connaissance réelle de la place que le secteur privé occupe réellement dans la vente de services aux agences de gouvernements. Selon Mr. Makki, il y a un manque d'échange d'information et une multiplication des incidents qui opposent les forces armées aux opérateurs privés.

En réalité, il existe un grand vide juridique au niveau national comme international dans l'encadrement de ces opérateurs privés. Ce constat est d'autant plus important qu'on remarque qu'au delà de la question civile militaire, le recours aux compagnies privées de sécurité présente également un intérêt politique (ex : profiter d'un maximum de flexibilité en évitant le contrôle du Parlement). Mr. Makki note néanmoins qu'il existe déjà quelques législations intéressantes comme celle d'Afrique du Sud. Cette loi est souvent citée comme exemple par les ONGs qui travaillent sur le terrain.

Prof. Spieker souligne le débat existant sur le critère d'imputabilité ou de responsabilisation du gouvernement pour des actes posés par des acteurs privés. La réflexion sur la qualification de ces acteurs comme combattants doit également être poursuivie.

In the aftermath of an armed conflict, the responsibility issue also includes the gathering of evidence.

For international jurisdiction, it is extremely important to get evidence that can document the crime committed. The chances to subsequently prosecute criminals are totally dependent on receiving evidence. International tribunals, not even the International Criminal Court, have the capacity to run around and collect evidence; they are totally dependent on external assistance to do the job. Unfortunately, the experience international tribunal have in this respect is to a large extend negative because the evidence that they receive is useless in court. There are norms that apply to the admissibility of evidence in court. Evidence sent to international tribunals does not comply with the formalities required (ex: no registration, no information concerning the location where the evidence was found, the circumstances or the time). Therefore, military and civil actors must be aware of the necessity of collecting evidence that can be used in criminal trials subsequently.

On this question, Mr. Bessler argues that although UN agencies, and the humanitarians in general, support actively international tribunals, they cannot be seen as agents of those jurisdictions. The network of contacts developed by humanitarian organisations, including governments, rebel forces and whoever can influence the fate of the population, could be undermined by such a vision. For instance, the agreement concluded between UN and the International Criminal Court constitutes a dilemma for OCHA to a certain degree. OCHA cooperates and shares information, but it is also put in a sensitive situation towards its interlocutors. Mr. Bessler considers that this is an issue that deserves more reflection.

Concluding, Ms. E-C Gillard, presents the views of the International Committee of the Red Cross on the private military companies. She explains that there is a legal *vacuum* when it comes to the status, accountability and rules of engagements of these private actors. The ICRC has been looking at the issue because these are new actors in conflict situations who come in much closer relationship with individuals protected by IHL. It is therefore natural for the ICRC to engage with them but also with the State that hired them, the State in which territory they are operating or where they are registered.

IHL lays down clear rules and obligations for these actors alongside clear responsibilities and obligations for the States that hire them. States where those

actors operate have got responsibilities to ensure respect of IHL rules as well. Under both international and national law, staffs of these companies and their States contractors are clearly accountable. There are however difficulties to implement these responsibilities in practice (ex: in Iraq, there is immunity from local process for these contractors). Nevertheless, this lack of implementation does not undermine the importance of basic principles on accountability.

Concerning the issue of the status of the staff of these companies, Ms. Gillard notes that it depends on the relationship of the PMC with the State. Unfortunately, as it often happens when implementing IHL, there is no single answer that could fit all the cases: it depends on the activities carried out and on the relationship with the States concerned. There are however rules for determining their status, and consequently their rights and obligations.

Furthermore, in view of the increasing presence of these actors in the field, and the debate that they have given rise to, the Swiss government has launched an intergovernmental initiative with the principle aim of promoting respect of IHL and HRL by private security companies, but also by the States that hire them, in whose territory they are operating and where they are registered. This initiative will have a twofold aim. The first part will seek to reaffirm these existing obligations and rights and reaffirming responsibilities. The second part is a little more ambitious and concerns a situation of *vide juridique* in the field of national regulations. The ICRC is proposing to develop some blueprints or templates of possible national legislation to be adopted by States in whose territories those companies are operating or registered as well as possible templates on minimum elements to be included in a contract when a State hires such actors. We must acknowledge that we are in the very early stage of the process.

Collegium, No.34, Autumn 2006

L'applicabilité du droit de l'occupation militaire aux opérations des organisations internationales[87]

Dr. Sylvain Vité

Les organisations internationales (OI), et les Nations Unies en particulier, tiennent aujourd'hui une place incontournable dans les zones de conflits. D'un point de vue juridique, cependant, la situation de ces OI pose un certain nombre de questions qui méritent d'être approfondies et discutées.

Le présent article aborde deux de ces questions. La première, "subjective" *(ratione personae)*, a trait à la capacité des organisations internationales d'être destinataires du droit international humanitaire (DIH), et plus particulièrement du droit de l'occupation militaire. Cette question est complexe en raison du fait que le droit de l'occupation a été conçu à l'origine pour s'appliquer à des États. Or, vu l'importance du rôle des OI sur le terrain, il est devenu fondamental de déterminer si ce régime juridique prévu pour des États peut être transposé à de nouveaux acteurs.

La seconde question porte sur un critère matériel. Elle vise à déterminer si les opérations internationales, et notamment les administrations civiles transitoires, répondent aux critères objectifs définis par le DIH pour être assimilées à des occupations militaires.

87 Cet article reprend quelques conclusions d'une étude plus large conduite par le Département de la recherche du Centre universitaire de droit international humanitaire (CUDIH) (<http://www.cudih.org/>) et financée par le Réseau universitaire international de Genève (RUIG/GIAN) (<http://www.ruig-gian.org/>). Cette étude a été publiée en 2005 : KOLB R., PORRETTO G., VITE S., *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales : Forces de paix et administrations civiles transitoires*, Bruxelles, Bruylant, 2005, 500 pp.

1. La capacité des organisations internationales d'être destinataires du DIH

La question relative à l'applicabilité du DIH aux organisations internationales trouve un premier élément de réponse dans la jurisprudence de la Cour internationale de justice (CIJ).

En effet, dans un arrêt de 1949 sur la réparation des dommages subis au service des NU, la CIJ a considéré que les NU possèdent "*une large mesure de personnalité internationale et ont la capacité d'agir sur le plan international*".[88]

Dès cette époque, la Cour a donc reconnu qu'une OI possède la capacité d'être titulaire de droits et de devoirs internationaux. Cette affirmation doit cependant être nuancée : une OI n'est pas souveraine, et par conséquent n'a pas de personnalité juridique pleine et entière comme les États. Les droits et les devoirs attachés à une OI sont définis par ses objectifs et l'exercice de ses fonctions, inscrits dans son acte fondateur ou déduits implicitement de ce texte.

Par conséquent, la possibilité d'appliquer le DIH, et donc le droit de l'occupation, aux NU repose essentiellement sur l'un des objectifs qui lui ont été attribués en vertu de la Charte de l'organisation, à savoir le maintien de la paix et de la sécurité internationales, ainsi que sur la fonction particulière, fondée sur le Chapitre VII de cet instrument, qui consiste à pouvoir mettre en place des forces armées.[89]

Cette première approche théorique trouve confirmation dans la pratique et plus particulièrement dans celle des NU. Dès les années 1950, en effet, les NU ont manifesté leur volonté d'être engagées à l'égard du DIH. Cette volonté s'est néanmoins exprimée, à l'origine, de façon prudente: l'organisation reconnaissait être tenue de respecter "*les principes et l'esprit*" des conventions relatives au droit des conflits armés.[90]

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88 CIJ, Réparations des dommages subis au service des Nations Unies, Avis consultatif, 11 avril 1949, Recueil 1949, p. 179.

89 Les objectifs de maintien de la paix et de la sécurité internationales sont prévus à l'article 1 de la Charte des Nations Unies. Le Chapitre VII (articles 39-51) concerne les actions en cas de menace contre la paix, de rupture de la paix et d'actes d'agression.

90 Voir notamment le *Modèle d'accord sur le statut des forces pour les opérations de maintien de la paix, in Rapport du Secrétaire général*, Doc. NU A/45/594, 9 octobre 1990, ainsi que le *Projet de modèle d'accord entre l'Organisation des Nations Unies et les Etats membres qui fournissent du personnel et de l'équipement à des opérations de maintien de la paix des Nations Unies*, Doc. NU A/46/185, 23 mai 1991, annexe, par. 28. Cette mention figure aussi dans plusieurs règlements militaires de l'Organisation, qui furent établis à partir des années 50 dans différents contextes. Voir par exemple *Règlement de l'UNEF*, ST/SGB/UNEF/1 (1957),

Cette approche prudente a connu toutefois une évolution significative au cours de ces dix dernières années. Trois exemples illustrent cette évolution. Le premier est la Convention (1994) sur la sécurité du personnel des NU et du personnel associé, qui aborde incidemment cette question.[91] Le texte indique que son application n'affecte en rien "*l'applicabilité du DIH […] consacré dans des instruments internationaux en ce qui concerne la protection des opérations des Nations Unies ainsi que du personnel des Nations Unies et du personnel associé, ou le devoir de ces personnels de respecter ledit droit et lesdites normes*". En envisageant ainsi l'applicabilité du DIH aux opérations des Nations Unies, cette convention définit non seulement les termes de la protection octroyée aux agents de l'organisation, mais elle fonde aussi l'obligation de ces agents de respecter ce régime juridique. Par ailleurs, en se référant au DIH " consacré dans des instruments internationaux ", elle laisse entendre que ce renvoi ne se limite pas " aux principes et à l'esprit des conventions ", mais elle en évoque directement le contenu normatif. Ainsi, dès 1994, un pas important est franchi.

Cette tendance est confirmée cinq ans plus tard avec l'adoption, le 6 août 1999, de la *Circulaire du Secrétaire Général des Nations Unies concernant le " respect du DIH par les forces des NU "*.[92] Ce texte affirme explicitement ce que laissait déjà entendre la Convention de 1994, puisqu'il lie les NU aux "principes et *règles* fondamentaux " du DIH.[93] L'idée inhérente à ce document d'administration interne, est de présenter de manière cohérente, bien que non exhaustive, les règles du DIH qui s'appliquent aux forces des NU.

Finalement, le troisième texte qu'il est important de citer est la Résolution 1327 du Conseil de Sécurité (2000).[94] Ce document reprend la terminologie de la *Circulaire*, à savoir que le personnel des NU doit respecter les règles et les principes du droit international, et du DIH en particulier. Ce qu'il importe de souligner ici, c'est que cette obligation sort désormais du cadre essentiellement administratif, que lui fixait la Circulaire du Secrétaire général, pour acquérir un impact politique et une force normative renforcés, grâce à l'autorité du Conseil de sécurité.

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art. 44 ; *Règlement de l'ONUC*, ST/SGB/ONUC/1 (1960), art. 43 ; *Règlement de l'UNFICYP*, ST/SGB/UNFICYP/1 (1964), art. 40, in *Basic Documents on United Nations and Related Peace-Keeping Forces*, R.C.R. Siekmann (ed.), Dordrecht/Boston/London, 1989 (2nd ed.).

91 Convention relative à la sécurité du personnel des Nations Unies et du personnel associé, signée à New York, le 9.12.1994.

92 Respect du droit international humanitaire par les forces des Nations Unies, *Circulaire du Secrétaire Général,* ONU Doc. ST/SGB/1999/13, 6 août 1999.

93 Par. 1.1

94 Résolution 1327 du Conseil de Sécurité, du 13.11.2000.

De ce bref aperçu il est permis de conclure que la question clé ne se pose plus aujourd'hui en termes d'applicabilité du DIH aux forces des Nations Unies. Il s'agit désormais de s'interroger sur l'adaptation des normes concernées à la structure des organisations internationales. Ce processus implique un effort de concrétisation, dont la Circulaire constitue un premier pas. Cet effort mérite d'être poursuivi pour résoudre les questions qui sont encore ouvertes, notamment celle de l'occupation militaire, que ne traite pas la Circulaire.

2. La qualification des opérations internationales

Un autre aspect complexe est lié à la question de savoir si certaines opérations internationales peuvent être assimilées à des occupations militaires. Certains auteurs considèrent en effet que les forces des OI, notamment celles des NU, peuvent, selon les circonstances se retrouver dans des conditions qui correspondent aux conditions objectives de l'occupation militaire.[95] Dans ces situations, le droit de l'occupation trouverait à s'appliquer. D'autres, en revanche, estiment que ces opérations sont d'une autre nature et répondent à des objectifs différents de ceux de l'occupation, notamment des objectifs définis par le Conseil de Sécurité.[96] Un régime juridique différent doit, dès lors, leur être appliqué.

Il est important de rappeler que l'applicabilité du droit de l'occupation, et du droit international humanitaire en général, est fondée sur le principe de l'effectivité. En d'autres termes, le droit de l'occupation s'applique lorsque deux conditions factuelles sont réunies, à savoir la présence de troupes étrangères d'une part, et l'absence de consentement du souverain quant à la présence de ces troupes, de l'autre. La légitimité de l'intervention en particulier n'entre pas en considération dans cette évaluation. Bien qu'une opération internationale menée sous l'égide des NU reçoive habituellement un accueil favorable de la part des populations locales, il existe des situations où les deux conditions sont objectivement remplies, et dans lesquelles le droit de l'occupation trouve à s'appliquer. Dès lors, faire dépendre l'application du DIH de la nature des opérations menées par l'OI risque d'entraîner une confusion de considérations relevant respectivement du *ius ad bellum* et du *ius in bello*.

95 ROBERTS A., « What is a Military Occupation », *British Yearbook of International Law*, Vol. 55, 1984, pp. 289ss. BENVENISTI E., *The International Law of Occupation*, Princeton (etc.), Princeton University Press, 2004 (2d ed.), p. 3.

96 Voir notamment SHRAGA D., «The UN as an actor bound by international humanitarian law», *Les Nations Unies et le droit international humanitaire*, Actes du Colloque international à l'occasion du 50e anniversaire de l'ONU, Pedone, Paris, 1996, pp. 326ss.

La doctrine envisage essentiellement l'application du droit de l'occupation militaire aux OI dans le cadre d'opérations coercitives fondées sur l'Article 42 de la Charte des NU[97], ainsi que dans le cadre de missions d'imposition de la paix.[99] Dans ces deux cas, l'exécution du mandat des forces internationales s'effectue, par définition, contre ou à défaut de la volonté des autorités du territoire sur lequel elles interviennent.

En revanche, l'application du droit de l'occupation militaire est plus improbable dans le cadre des opérations de maintien de la paix. Celles-ci sont, en effet, basées sur un consentement du souverain, du moins au commencement des opérations.[99]

Quant aux administrations civiles transitoires, elles sont quelque peu différentes des situations que nous venons d'évoquer, et soulèvent de ce fait des questions particulières quant au régime juridique qui leur est applicable. Ce qui paraît déterminant à cet égard, c'est que les nouvelles structures de pouvoir mises en place trouvent leur fondement dans une résolution du Conseil de Sécurité. De plus, cette résolution prévoit en principe une transformation de l'ordre juridique et institutionnel du territoire concerné.

Deux hypothèses, issues de la pratique, doivent être distinguées pour aborder cette question. La première situation vise celle où l'ancien souverain donne son consentement à la mise en place du nouveau régime. Tel est le cas par exemple de l'administration internationale au Kosovo. Dans une telle situation, on ne peut pas parler d'occupation au sens strict car il n'y pas d'opposition entre l'État concerné et les forces internationales. Le droit applicable est donc déterminé en fonction de l'accord conclu et de l'éventuelle résolution de Conseil de sécurité qui établit l'opération.

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97 Article 42: "Si le Conseil de Sécurité estime que les mesures prévues à l'article 41 [mesures n'impliquant pas l'emploi des forces armées] seraient inadéquates ou qu'elles se sont révélées telles, il peut entreprendre, au moyen de forces aériennes, navales ou terrestres, tout action qu'il juge nécessaires au maintien et au rétablissement de la paix et de la sécurité internationales. Cette action peut comprendre des démonstrations, des mesures de blocus et d'autres opérations exécutées par des forces aériennes, navales ou terrestres des membres des Nations Unies."

98 BOWETT D.W., United Nations Forces: A Legal Study of United Nations Practice, Stevens and Sons, London, 1964, pp. 490 ; EMANUELLI C., Les actions militaires de l'ONU et le droit international humanitaire, Wilson et Lafleur Itéé, Montréal, 1995, p. 40 ; GREENWOOD C., «International humanitarian law and UN military operations », Yearbook of International Humanitarian Law, Vol. 1, 1998, p. 28.

99 La situation peut cependant évoluer et le souverain peut ne plus accepter la présence des forces internationales sur son territoire. Dans ce cas, une application formelle du droit de l'occupation serait envisageable.

Certains auteurs estiment à cet égard que le droit de l'occupation militaire offre des solutions appropriées aux besoins des institutions concernées, particulièrement au cours des premiers mois de la mise en place du nouveau régime. L'application des normes relatives à l'occupation serait alors opérée non pas par voie d'applicabilité formelle, mais par analogie, c'est-à-dire en tant que " source d'inspiration ".[100]

Cependant, même si cette solution doit être encouragée, car elle favorise un certain cadre normatif, elle reste insatisfaisante, dans la mesure où elle fait entièrement dépendre l'application du droit de l'occupation de la bonne volonté des troupes engagées, qui peuvent soit renoncer à appliquer les règles en question, soit décider de n'appliquer que celles qui leur conviennent. Dans ces conditions, le droit perd donc de sa prévisibilité, ce qui est source d'insécurité juridique pour ses destinataires. Afin de pallier cette dérive, il peut être suggérer que le Conseil de Sécurité, dans la résolution portant création de l'administration transitoire, impose l'application du droit de l'occupation, au moins à titre transitoire, c'est-à-dire tant que les nouvelles autorités n'ont pas fixé elle-même un cadre juridique suffisant par voie de règlement.

La seconde hypothèse envisagée est celle de l'absence d'accord de l'ancien souverain pour la mise en place du nouveau régime. Les critères objectifs de l'occupation sont dans ce cas remplis : il y a une présence étrangère pour laquelle le souverain n'a pas donné son consentement. On se trouve ici confronté au problème de la compatibilité entre le régime de l'occupation, qui tend à préserver le *statu quo* institutionnel et législatif du territoire occupé, et les objectifs de l'opération, qui impliquent une transformation en profondeur du système en place.

Plusieurs options ont été envisagées pour remédier à ce qui semble être une contradiction. Celle qui semble la plus cohérente juridiquement consiste à considérer que l'administration internationale n'est ici qu'un cas particulier d'occupation militaire et reste, en tant que telle, soumise aux règles pertinentes en la matière. Le Conseil de sécurité serait toutefois habilité, en vertu de ses pouvoirs découlant du chapitre VII de la Charte des Nations Unies, à intervenir pour justifier des exceptions à ce régime en fonction des besoins spécifiques de chaque mission.

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100 KELLY M.J., MCCORMACK T.L.H., MUGGLETON P., OSWALD B.M., « Legal aspects of Australia's involvement in the International Force for East Timor », RICR, n. 841, vol. 83, 2001, p. 115; DAVID E., *Principes de droit des conflits armés*, Bruxelles, Bruylant, 2002, p. 501 ; SASSOLI M., « Droit international pénal et droit pénal interne : Le cas des territoires se trouvant sous administration internationale », *Le droit pénal à l'épreuve de l'internationalisation,* M. Henzelin et R. Roth (éd.), Paris (etc.), LGDJ (etc.), 2002, p. 143.

A nouveau, le risque de confusion entre des considérations de *ius ad bellum* et *ius in bello* est présent dans ce cas. En tout état de cause, l'étendue du pouvoir du Conseil de sécurité devrait être délimitée. La résolution établissant l'administration transitoire devrait d'abord être suffisamment précise et prévoir un régime juridique uniforme, c'est-à-dire applicable à tous les acteurs impliqués sur le terrain. Tel n'est par exemple pas le cas dans l'exemple du Kosovo.

De même, un système de mise en œuvre du droit applicable devrait être explicitement prévu. A ce titre, deux problèmes particuliers méritent d'être soulignés. Le premier a trait à l'immunité du personnel engagé sur le terrain. Au Kosovo, par exemple, les agents des OI concernées bénéficiaient de l'immunité.[101] Or, s'il on peut accepter que ces personnes bénéficient d'une immunité à l'égard des juridictions nationales dans le cadre d'une opération de maintien de la paix traditionnelle, il en va autrement lorsqu'il s'agit d'une immunité à l'égard des juridictions de l'administration transitoire elle-même. Dans ce cas, l'immunité revient à placer le personnel international au-dessus des lois.[102]

Le second problème concerne la supervision internationale de ces opérations. Dans le cas du Kosovo, la résolution du Conseil de Sécurité ne précise pas l'organe dont relève le contrôle de la mise en œuvre du régime juridique. Une solution possible, bien que peut-être idéaliste, serait d'attribuer cette compétence, dans le cas par exemple de l'application des conventions relatives aux droits de l'Homme, aux organes chargés de superviser chacune de ces conventions.

Cette question a été posée au Comité des droits de l'Homme des Nations Unies par rapport à la situation actuelle du Kosovo. Consulté sur la question, le Comité s'est montré progressiste, puisqu'il s'est reconnu compétent pour examiner la question du respect des droits de l'Homme par l'administration provisoire instaurée au Kosovo. Compte tenu du statut particulier de cette région, il a toutefois renoncé à se prononcer sur la base unique des informations présentées par la Serbie-et-Monténégro et a décidé de reporter sa décision concernant cette

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101 UNMIK/REG72000/47, 18 août 2000, (« On the status, privileges and immunities of KFOR and UNMIK and their personnel in Kosovo »).

102 Voir en ce sens Ombudsperson in Kosovo, Special Report No.1 on the Compatibility with Recognized International Standards of UNMIK Regulation No.2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo, 18 August 2000, par. 21-27; Gil-Robles Alvaro, European Commissioner for Human Rights, Kosovo: The Human Rights Situation and the Fate of Persons Displaced From Their Homes, CommDH (2002)11, Strasbourg, 16 October 2002, par. 37-43.

zone sous administration internationale.[103] Similairement, certaines procédures spéciales de la Commission des droits de l'Homme des Nations Unies ont aussi étendu leurs compétences à des activités conduites par des organisations internationales.[104] Cette tendance devrait être désormais systématisée.

Conclusion

En définitive, il apparaît que les possibilités d'appliquer formellement le droit de l'occupation aux organisations internationales restent assez limitées. Ces opérations sont en effet basées en principe sur l'accord des parties, alors que l'absence de consentement est une des conditions objectives de l'application du droit de l'occupation. Par ailleurs, le *statu quo*, que cherche à préserver le droit de l'occupation, se prête mal aux nécessités des administrations provisoires.

Par conséquent, si le droit de l'occupation présente une grande utilité au commencement des opérations des administrations civiles transitoires, c'est-à-dire à un moment où la situation sur le terrain est encore instable, il risque de se révéler inadapté sur le long terme. La mise en place des administrations civiles transitoires montre ainsi que l'élaboration d'un régime juridique évolutif est nécessaire et possible, un régime qui devrait être basé sur les complémentarités du droit de l'occupation et des droits de l'homme.

103 Observations finales du comité des droits de l'homme : Serbia and Montenegro, CCPR/CO/81/SEMO, 12 août 2004.

104 Voir par exemple Rapports du Rapporteur spécial de la Commission des droits de l'homme sur la situation des droits de l'homme en Bosnie-Herzégovine, en République de Croatie et en République fédérale de Yougoslavie, Doc. NU A/55/282-S/2000/788, 9 August 2000, par. 101ss, et A/55/282, 20 octobre 2000, par. 106 ; Question of the human rights of all persons subjected to any form of detention or imprisonment, in particular : torture and other cruel, inhuman or degrading treatment or punishment, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2001/62, Addendum, UN Doc. E/CN.4/2002/76/Add.1, du 14 mars, par. 1819s

Collegium, No.34, Autumn 2006

External Action of the European Union

Mr. Gert-Jan van Hegelsom

This contribution intends to present an overview of the operations and missions undertaken by the European Union, and the various problems encountered. As it will be seen, the structural particularities of the Union add some complexity to the already challenging environment created by the coexistence of civilian and military actors in the field.

1. Basic principles of the European Union external action:

The European Union (EU) is a special feature on the international stage, operating in a strict legal framework. Its actions and operations are based on specific articles contained in the treaties.

Among the main and most often referred provisions, it is worth pointing out article 6 of the Treaty on the European Union (TEU), which states, *inter alia:*

The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Fundamental Rights and Fundamental Freedoms (…) and as they result from the constitutional tradition common to the Member States, as general principles of Community law.

Hence, these "general principles" must be respected not only at European level, but also at national level within each of the Member States.

Framing the Common Foreign and Security Policy (CFSP), article 11 of the TEU provides that the European institutions and the Member States shall respect and ensure respect of the following objectives:

- *To safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter,*
- *To strengthen the security of the Union in all ways,*
- *To preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including on external borders,*
- *To promote international cooperation*
- *To develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.*

The High Representative/Secretary General of the Council, Javier Solana, reflected these principles in December 2003 in the *European Security Strategy*[105]:

(…) our security and prosperity increasingly depend on an effective multilateral system. The development of a stronger international society, well functioning international institutions and a rule based international order is our objective. We are committed to upholding and developing International Law. The fundamental framework for international relations is the United Nations Charter. (…) We want international organisations, regimes and treaties to be effective in confronting threats to international peace and security, and must therefore be ready to act when their rules are broken.

Despite its relatively short experience in external operations and the continuous development of its capacities, the EU has an inherent comparative advantage - assisting third countries in a wide variety of sectors, as it will be seen *infra*.

As a new actor in crisis management on the international stage, the Union is still in a steep learning curve, particularly when one compares it to long standing organisations such as NATO. It is, however, an ongoing process through which the EU tries to set up and develop its operational capacities in its own way, including, through a comprehensive lesson learning process. Hence, planning of crisis management operations tends to follow a set procedure, of which most steps can be skipped should the situation so require. In particular, the question whether the EU should further focus operational efforts on a specific situation is answered on the basis of a general concept, which analyses the EU engagement to date, determines the shortfalls and identifies avenues for further action. Should agreement be reached within the competent Council bodies, a legal instrument setting out the objectives of the Union is adopted (normally in the

105 A Secure Europe in a Better World. European Security Strategy. 12.12.2003.

form of a Joint Action pursuant to article 14 TEU). Upon decision by the Council, operational planning starts and culminates in the decision to launch the operation.

2. EU external operations

Initially, the European Union Common Foreign and Security Policy provided for two different crisis management activities: military and civilian capabilities. Both branches have evolved rather quickly and independently for the past few years.

The military "wing" has been given the first boost in 1999, when the Union's heads of State and Government, meeting in Helsinki, committed themselves to develop an autonomous capacity to take decisions and, "*where NATO as a whole is not engaged, to launch and conduct EU-led military operations in response to international crises*".[106] To be able to undertake such operations, the EU agreed on the *Helsinki headline goal* to be progressively implemented before 2003.[107] The subsequent Nice European Council established the politico-military structures required for the management of operations of the Union, *i.e.* the Political and Security Committee and the Military Committee.

The development of the second *volet* of the EU CFSP was strongly stimulated by the Portuguese Presidency during the first semester of 2000. The Feira European Council, in particular, called for further action in the field of civilian crisis management. Four priority areas were singled out: police, rule of law, administration and civil protection.[108] A permanent Committee for civilian aspects of crisis management was set up and priority areas for targets in civilian aspects of crisis management were identified. The Member States also undertook that they would be able "*to provide up to 5.000 police officers for*

106 Helsinki European Council conclusions, 10-11.12.1999.

107 Five goals were defined in Helsinki: 1. cooperating voluntarily in EU-led operations, member States (MS) must be able, by 2003, to deploy within 60 days and sustain for at least 1 year military forces of up to 50.000-60.000 persons capable of the full range of Petersberg tasks; 2. new political and military bodies and structures to be established within the Council to enable the Union to ensure the necessary political guidance and strategic direction to such operations, while respecting the single institutional framework; 3. modalities to be developed for full consultations, cooperation and transparency between the EU and NATO, taking into account the needs of all EU MS; 4. appropriate arrangements to be defined that would allow, while respecting the Union's decision-making autonomy, non-EU European NATO members and other interested States to contribute to EU military crisis management; a non-military crisis management mechanism to be established to coordinate and make more effective the various civilian means and resources, in parallel with the military ones, at the disposal of the Union and the MS.

108 Feira European Council conclusions, 19-20.06.2000. See also the Göteburg European Council conclusions, 15-16.06.2001.

international missions across the range of conflict prevention and crisis management operations" and that they would be able to identify and deploy up to 1.000 police officers within 30 days.

Nowadays, the European Union runs eight civilian and military operations in different parts of the world. It must be noted that although qualified as "civilian", some of the civilian operations are “mixed" (civil-military) since either the recourse to military personnel is necessary in order to be able to actually perform the mission, or both military and civilian expertise is required.

- ALTHEA - Bosnia: as a follow-up to SFOR, a military operation, undertaken by the EU with recourse to NATO common assets and capabilities. The EU also conducts a police mission (European Union Police Mission EUPM) that took over from the UNIPTF, aimed at police reform in Bosnia. Both missions operate under the General Framework Agreement for Peace (also referred to as the Dayton Peace Agreement).
- Balkans: the European Union Monitoring Mission since 1991.
- PROXIMA - Former Yugoslav Republic of Macedonia: police mission aimed at police reform pursuant to the Ohrid framework.
- EU JUST LEX - Iraq: which is not yet fully operational, the objective of which is to train Iraqi officials involved in the justice system, including magistrates public prosecutors, police investigators and prison management.
- RDC: EUPOL Kinshasa, a police mission aimed at assisting in particular the training and operationalisation of newly formed Integrated Police Units, and recently, the first security sector mission EUSEC RDC. It is the first ever dedicated SSR mission launched: it will assist in the reform of the Congolese Ministry of Defence structures and help in ensuring the viability of the new Congolese Armed forces.
- Indonesia (Aceh): the Aceh Monitoring Mission (AMM) where the EU. in cooperation with ASEAN, assists the Indonesian government and the previous rebel movement GAM in the implementation of the Memorandum of Understanding of August 2005, governing the return to democracy and rule of law in the Aceh province; this operation included the decommissioning of weapons, withdrawal of military and security forces, re-integration of former rebels, the development of a new regulatory framework, amnesty of former rebels, the monitoring of human rights and the holding of elections.
- Sudan: an assistance mission to the African Union, which is responsible for the setting up and running of AMIS in Darfur: in addition to financial support from the African Peace Facility, a dedicated financial envelope from the European

Development Fund, the EU provides cease fire observers, police monitors and expertise to the AMIS chain of Command and, together with NATO, logistic support for the rotation of contingents coming from African countries.

It must be pointed out that on the basis of European Community instruments, a new border assistance mission has been launched in Moldova and Ukraine, including Transnistria.

These operations vary widely in nature and the environments where they are run often give rise to issues that require the presence of lawyers in the field, in order to ensure the quality of the mission, to assist re-drafting the legislation or the public administration procedures in the country concerned.

3. Development Cooperation and cooperation with third countries: the basis for conflict prevention

The role that the Union is called upon to play on the international sphere in crisis management is complemented by the numerous cooperation programmes undertaken in a large variety of countries around the world. Those programmes are run either by the European Community or by the Member States, through voluntary European cooperation, like the European Development Fund, in addition to the development cooperation programmes run by Member States on a bilateral basis.

Community programmes are based either on article 177[109] or article 181[110] of the Treaty establishing the European Community (TEC). Both these articles provide that Community policy - or technical cooperation with third countries - shall contribute to the general objective of consolidating democracy and the rule of law and enforcing respect for human rights and fundamental freedoms.

109 "Community policy in the sphere of development cooperation, which shall be complementary to the policies pursued by the Member States, shall foster: - the sustainable economic and social development of the developing countries, and more particularly, the most disadvantaged among them; - the smooth and gradual integration of the developing countries into the world economy; - the campaign against poverty in the developing countries. Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms. (…)".

110 "Without prejudice to (...), the Community shall carry out, within its sphere of competence, economic, financial and technical cooperation measures with third countries. (…) Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to the objective of respecting human rights and fundamental freedoms. (…)

In addition to the crisis management capabilities of the Union, its development and cooperation programmes, the 2001 Goteborg programme on the Prevention of Violent Conflict tries to ensure consistency in the Union's external action, by systematically charting possible preventive action and - through its annual reporting system - ensuring that such action is adequately followed up. As the Security Strategy recognises, conflict prevention is the preferred choice. Conflict prevention or post-conflict reconstruction programmes run by the European Community are, by nature, better implemented in a rather stable environment. They assist in preventing the resurgence of violence and, hence, reinforce any specific policies developed under the CFSP.

4 Development of doctrine

Developments of both kinds of policies are important in terms of field action but also as far as doctrine is concerned. The EU has created an extensive body of doctrine on military operations building on NATO, the WEU and the UN experiences.

Unfortunately, civilian operations are less well documented, although big efforts are made to develop a doctrinal approach to the wide variety of challenges encountered in the field.

The Union's doctrinal development starts from the premise of three different scenarios. The first relates to the situation of a "failed State": the action needed would be of substitutive nature. The EU mission would have to ensure core aspects of statehood. The second scenario is that of a "weak State". In such circumstances, the EU mission would substantially reinforce the ability of the State to actually conduct its responsibilities. The last scenario considered would be the situation where a limited number of sectors within the State do not function correctly, requiring assistance to improve their performances.

Lately, focus on doctrinal development is also related to fundamental areas of public administration: do we have to set up a civil registry? How to set up the core infrastructure for local government, including elections? Furthermore, the issue of development of core social functions (education, health) and the capability to address infrastructural issues (water, energy, transport and telecommunication facilities) is emerging.

All these concrete, material issues do not need to address the question of the applicable law, since the EU normally only takes action on the invitation of the host country or under a Security Council resolution. Furthermore, while performing its tasks in the concerned country, the Union gives priority to the respect of local laws and traditions in the accomplishment of its missions, unless these are inconsistent with human rights standards, good governance and the rule of law. In such case, the EU mission in the field will assist in the development of a legislative programme to complete its tasks. The EU has acquired some experience in rule of law missions; in Georgia for instance, the EU assisted the judiciary to reinforce the conformity of the judicial system with international law. In terms of public administration, however, the experience of the Union is currently rather limited.

Conclusion

The international community is very active in the field of assisting and cooperating with third countries victims of human or natural disasters, conflicts or a lack of democracy and rule of law. However, one must be aware of the negative perception that the local population may have. Indeed, there is sometimes a clear *fatigue* towards the international community that leaves the country after a relatively short while with unsolved problems. Therefore, the international community needs to reform the way it undertakes actions in the recipient countries. Better coordination of action, combination of short term and longer term assistance, incident management and structural reform should help to avoid duplication and to achieve better results. One of the core elements in this regard, is the development of a smooth transition between the wide variety of instruments that the international community, and in particular the EU, have at their disposal to create an environment conducive to development and eradication of the root causes of conflict.

M. Solana said recently that the current resources would not "simply do it". More means and efficient use of them are necessary, considering the magnitude of the task that still needs to be carried out.

Collegium, No.34, Autumn 2006

Legal Interoperability in Multinational Forces: A Military Necessity

Dr. Marten Zwanenburg

Introduction

The issue of the "law applicable to multinational forces in administered territories" is a broad topic that covers a large number of highly contentious legal questions, such as the applicability of the law of occupation to peace operations and the extraterritorial application of human rights instruments.

This contribution will focus in particular on the application of law within multinational forces. Indeed, the participation of the armed forces of more than one State in a military operation almost inevitably gives rise to questions on the law applicable and the interpretation of it.[111] This is often referred to as the need for *legal interoperability*.

The first part of this paper will briefly discuss the main (legal) instruments affecting the relationship among the armed forces that constitute a multinational force. In a second section, examples of practical responses given to issues of interoperability will be analysed. Finally, some observations will be made on the sources of differences in the legal frameworks or interpretations that give rise to these issues.

1. Legal instruments relating to multinational forces

In order to understand the issues of legal interoperability that will be discussed later, it is necessary to briefly analyse the main instruments that determine the legal relationship within the multinational force: the *international mandate*, the *Operation Plan*, the *Status of Forces Agreement* if available, the *Rules of*

111 Similar to communication or information systems differences, these legal issues must be addressed for the multinational force to be able to cooperate effectively.

Engagement (RoE) and the *Memoranda of Understanding* (MoUs) between the participating nations.

- The international mandate:

It is the legal basis for the actual presence and activities of the multinational force in the territory of the host State, as required by international law. This will normally be a UN Security Council resolution, although other legal bases, such as the consent of the host State can also be found.[112]

- The Operation Plan (OPLAN):

On a more operational level, the Commander of a multinational operation will normally write an OPLAN. This is defined as "*A plan for a single or series of connected operations to be carried out simultaneously or in succession. It is usually based upon stated assumption and is the form of directive employed by higher authority to permit subordinate commanders to prepare supporting plans and orders. The designation "plan" is usually used instead of "order" in preparing for operations well in advance. An operation plan may be put into effect at a prescribed time, or on signal, and then becomes the operation order.*"[113]

The OPLAN must be approved by the relevant political authority.[114] The military commander then issues the approved document in the form of an Operation Order (OPORD).[115] Both documents include the commander's intent as well as a list of tasks for the force.

- The Status of Forces Agreement (SoFA):

This is an agreement between the host State and the sending State or organisation that sets out the legal status of the force. Without such an agreement, the force and its members are subject to the law of the host State.[116]

112 See the Kosovo Force's mandate (KFOR), authorised by UN Security Council Resolution 1244 (10.06.1999). It establishes the force and authorises it under Chapter VII of the Charter to use all necessary means to fulfil its mandate.

113 NATO Glossary of Terms and Definition, AAP-6 (2005) at 2-0-3.

114 In the case of the KFOR, the OPLAN was approved by the North Atlantic Council, the highest political body of NATO.

115 An OPORD is "a directive, usually formal, issued by a commander to subordinate commanders to subordinate commanders for the purpose of effecting the coordinated execution of an operation." (NATO Glossary of Terms and Definition, AAP-6 (2005).

116 See the SoFA concluded by Australia, as the leading nation, and Indonesia concerning the legal status of the International Force for East Timor (INTERFET).

Among the important provisions of such instrument are the ones concerning immunity of the operation and its personnel from the jurisdiction of the host State.

- The Rules of Engagement (RoE):

According to the American definition, RoE are "*Directives issued by competent military authority that delineate the circumstances and limitations under which […] forces will initiate and/or continue combat engagement with other forces encountered.*"[117]

In other words, the RoE are not legal instruments although they are based on legal, political and operational considerations.[118] They do not assign tasks - these are given in the mandate and OPLAN - but rather consist of a set of practical rules containing authorisations and prohibitions regarding specific types of actions.[119]

- The Memorandum of Understanding (MoU):

States participating in a multinational force sometimes conclude MoUs among themselves in order to regulate arrangements related to issues, particularly of a technical, logistic or communications nature. They may also address some legal issues.[120]

2. Practical examples

- Detentions in Iraq:

The MoU on the situation in South East Iraq, concluded among the States contributing to the Multinational Division provided guidance on the management of detainees. It stated that detained persons who were suspected of common crimes would be handed over to the Iraqi authorities. On the other

117 Joint Publication 1-02, Department of Defence Dictionary of Military and Associated Terms, 12.04.2001, as amended 31.08.2005, 465.

118 See G.R. Phillips, "Rules of Engagement: A Primer", *Army Lawyer* 4 (1993), 7-9.

119 For instance, the authorisation for KFOR to use force was based on the Security Council Resolution 1244 and such authorisation is an important part of the KFOR RoE. The RoE are drafted, like for any NATO operation, by the Supreme Headquarters Allied Powers Europe (SHAPE), and agreed by the North Atlantic Council.

120 That was the case in the MoU concluded between the States contributing to the Multinational Division led by the United Kingdom in South East Iraq, which contained *inter alia* guidance on the treatment of detainees. (Kamerstukken II 2003-04, 23432, n°165, 21)

hand, those suspected of war crimes or posing a threat to the Multinational Division, would be handed over to the British forces who were the only ones that had detention facilities.[121]

The Netherlands was one of the States that contributed troops to the Multinational Division South East. On the basis of UN Security Council Resolution 1483, it did not consider itself an occupying power in the sense of the Geneva Conventions.[122] The United Kingdom (UK) was considered an occupying power, and this different legal status created a difference in rights and obligations.

Indeed, both the UK and the Netherlands had the power to detain persons on the basis of the general rules of the mandate and international humanitarian law (IHL).[123] However, only the UK had the specific rights and obligations that arise under the law of occupation, one of these rights being the power to intern persons. The Netherlands made this understanding clear in a declaration annexed to the MoU concerning the Multinational Division.

The issue of detainees became a real concern when Iraq reinstated the death penalty in August 2004.[124] The Danish forces in Iraq suspended handing over detained persons to the Iraqi authorities, and to the British, until there was a clear agreement that the UK would not hand the persons over to the Iraqis without prior Danish approval.

The grounds of the Danish decision were not totally clear. Some suggested that the reason was the fear of potential breach of the European Convention on Human Rights (ECHR). The ECHR itself does not prohibit the death penalty, whereas Protocols 6 and 13 abolish it respectively in peacetime, and "in all circumstances", including war. Denmark being party to both instruments, cannot carry out death penalty. However, nothing is expressly stated on the handing over of persons to another State that may execute them. Notwithstanding, the European Court of Human Rights held in a similar case

121 Kamerstukken II 2003-04, 23432, n° 165, 21.

122 Kamerstukken II 2002-03, 23432, n°165, 8.

123 Resolution 1483 called upon all the parties concerned to comply fully with their obligations under international law including in particular the 1949 Geneva Conventions and the 1907 Hague Regulation. After 16 October 2003, the power to detain persons arose from Security Council Resolution 1511 (16.10.2003), which authorised the multinational force to take all necessary measures to contribute to the maintenance of security and stability in Iraq.

124 J.Finer, N. Norui, "Capital Punishment Returns to Iraq", *Washington Post*, 26.05.2005.

that extradition would be a violation of Article 3 of the ECHR on the prohibition of torture and inhuman or degrading treatment.[125]

This raises the question of the extraterritorial character of the ECHR and deserves extensive discussion, which falls outside the scope of the present contribution.[126] Two comments deserve however to be made. The first concerns the question of the application of the ECHR to the multinational force in Kosovo that is pending before the European Court of Human Rights.[127] The second relates to the application of the ECHR to forces in Iraq that is considered by a British High Court, in the *Al Skeini* case.[128]

On the Danish decision previously discussed, it can be said that although there is no clarity on the grounds of the decision, policy considerations may (also) have played a role.

- Tear Gas in Kosovo:

The second example relates to one of the tasks that a multinational force might be led to undertake, being crowd and riot control. Tear gas is a very useful

125 Soering v. United Kingdom, (1989) ECHR 439. The Court held that the UK could not extradite a person to the United States because of the possibility that he would be subjected to the "death row phenomenon". At the time, the UK was not yet party to Protocol 6 to the ECHR. It may be asked whether, if it had been, the extradition would have raised questions concerning the death penalty itself. Case-law of the former European Commission of Human Rights suggest it could in the *Dehwari* case (Mahammad Rahim Aspichi v. the Netherlands, Appl. n° 370/97, report of the European Commission of Human Rights, 29.10.1998. See also, x v. the Netherlands, Appl. n°33124/96, report of the European Commission of Human Rights, 9.07.1998. See also, the views of the UN Human Rights Committee in Judge v. Canada, Communication n° 829/1998, 13.08.2003, UN Doc. CCPR/C/78/D/829/1998.

126 R. Lawson, Life After Bankovic: on the Extraterritorial Application of the European Convention of Human Rights, in F. Coomans, M. Kamminga (Eds.), Extraterritorial Application of Human Rights Treaties, (2004); K. Altiparmak, "Bankovic: an Obstacle to the Application of the European Convention on Human Rights in Iraq?", Journal of Conflict and Security Law, 213 (2004).

127 One of the pending cases is Behrami and Behrami v. France, Appli. n° 71412/01. The case concerns alleged negligent failure to act by KFOR troops to mark and defuse unexploded cluster bombs.

128 R (on the application of Al-Skeini and others) v. Secretary of State for Defence, [2004] EWHC 2911, 14.12.2004. The claimants were all relatives of Iraqis civilians killed by British forces in Iraq. Based on the jurisprudence of the European Court of Human Rights, the British court held that a State's party jurisdiction in the meaning of article 1 ECHR, is essentially territorial. That jurisdiction can exceptionally be extended abroad, but never to the total territory of another State which is not part to the Convention.

means in such circumstances. It is also a "riot control agent" in the sense of the Chemical Weapons Convention of 1993.[129]

The Convention limits the use of tear gas in two ways. First, it prohibits the use of chemical weapons whose definition covers tear gas. However, it is not considered a chemical weapon when used for certain specific purposes that include "*law enforcement including domestic riot control purposes". Second, the Convention prohibits the use of* "riot control agents" as a "*method of warfare*".

Neither "*law enforcement*" nor "*method of warfare*" are defined in the Convention, leaving large room for interpretation.[130] The varying interpretations have an impact in practice since for specific operations that may require the use of tear gas the multinational commander can use some contingents but not others.

- RoE Issues in East Timor:

As stated above, RoE are a numbered set of rules containing authorisations and prohibitions. The starting point for the drafting of RoE is the principle that self-defence is always permitted and therefore does not require a specific RoE. However, force used beyond the limits of self-defence requires authorisation.

It must be pointed out that self-defence, in the meaning used above, does not refer to Article 51 of the UN Charter, but rather as defined in national criminal law of the contributing States. This means that when the RoE allow use of force in situations of self-defence, the authorisation will have different meanings for the different contingents.

In the particular case of East Timor, the INTERFET had legal problems concerning provisions on the use of lethal force for the protection of property. Australia and the US accepted such provisions while the UK, New Zealand and Canada did not - on the grounds of domestic legal considerations.[131] That led therefore to two contingents being assigned different tasks.

129 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction, 13.01.1993.

130 See *e.g.* E. Harper, "A Call for a Definition of Method of Warfare in Relation to the Chemical Weapons Convention", 48 Naval Law Review 137 (2001); D. Fidler, *Incapacitating Chemical and Biochemical Weapons and Law Enforcement under the Chemical Weapons Convention*, background paper prepared for the Symposium on Incapacitating Chemical Weapons, Geneva, 11.06.2005.

131 M. Kelly, "Legal Factors in Military Planning for Coalition Warfare and Military Interoperability: Some Implications for the Australian Defence Force, 2 *Australian Army Journal* 161 (2005).

3. Sources of differences in legal frameworks

In addition to the questions of legal interoperability illustrated by the three examples presented above, there are many other issues. This contribution does not intend to give an exhaustive overview of all the questions that may arise, but the examples given can be understood as a starting point for addressing issues of legal interoperability.

One conclusion that can be drawn is that there is not always "one law" that applies to a multinational force. In some cases such as in Iraq, there are several legal frameworks: the US and the UK as occupying powers had rights and obligations under rules of occupation, whereas other States contributing troops did not have these prerogatives.[132]

This kind of situation can also arise when some States contributing to the multinational force are party to a particular treaty while others are not. This has been previously illustrated in the example related to the detention issue encountered in Iraq - when the death penalty was restored. The same kind of situation often arises in relation to the Ottawa Convention on the prohibition of use of anti-personnel mines.[133] Even if the States are party to the same treaties, problems of application may arise on the differences of interpretation.
The second conclusion that can be drawn is the fact that legal considerations are often intertwined with policy issues. That may have been the case of Denmark refusing to hand over detainees to the Iraqi authorities.

Finally, it is important to stress that international law is not the only field of law that leads to questions of interoperability between States contributing to a multinational force. National law may also have this effect. One example is the definition of the term self-defence in RoE in relation to property discussed above. In this respect, it is important to note that the interpretation of terms in the RoE is not a theoretical issue. Indeed, in most States domestic criminal law applies extraterritorially to military personnel. If force is used, this may lead to a criminal prosecution.

132 M. Zwanenburg, "Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation, 86 *International Review of the Red Cross*, 745 (2004).

133 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of 18 September 1997.

Conclusion

The number of multinational forces is expected to increase. After the end of the Cold War, many armed forces have shifted from being primarily concerned with defence of the national territory, to playing an important role in the maintenance of international peace and security, normally within the framework of a multinational force. As we have seen, issues of legal interoperability inevitably arise from such complex structures.

The examples evoked in this contribution have shown that legal interoperability questions arise from the coexistence of different legal frameworks. Indeed, there is no unique law applicable to a multinational force acting in administered territories; there rather are as many laws as there are States participating in the force.

It is important to note that States cannot be expected to change the legal framework they bring to a multinational force, because that would mean discarding doctrines that have been carefully developed over the years or to ratify treaties to which they are strongly opposed.

As a result of all these considerations, it can be said that legal interoperability is about managing differences rather than resolving them. In practice, a number of mechanisms have been developed to contribute to that task. These mechanisms have an important role to play in ensuring the effective functioning of a multinational force. In other words, legal interoperability is a military necessity.

Conclusions

Mesdames, Messieurs, chers amis,

Je viens de pays viticole et partout où il y a de la vigne on parle de bonnes années ou de mauvaises années en fonction de la qualité de la vendange. Je crois pouvoir dire sans hésiter que l'année 2005 était une bonne année pour le Colloque de Bruges, au vu de la qualité des interventions et des débats sur un sujet dont le choix s'est révélé des plus pertinents.

Parler de vendanges c'est aussi évoquer de très anciennes traditions. Il est trop tôt pour le dire du Colloque de Bruges, mais c'est bien déjà presque une tradition que cette manifestation conjointement préparée par le Collège d'Europe et par le CICR puisque c'est déjà la 6ème fois qu'elle est organisée et j'ose espérer que c'est une tradition qui va se perpétuer.

Je ne saurais ici prétendre résumer toutes les excellentes interventions et les débats de ces deux jours, d'autant plus qu'elles feront l'objet d'une publication. Je me contenterai donc de vous faire part de quelques réflexions, de nature générale, qu'ils m'ont inspirées, la première de celles-ci étant d'ailleurs la difficulté d'isoler les différents problèmes liés à l'occupation : il est nécessaire d'avoir à l'esprit une vision globale du problème de l'occupation pour trouver des réponses aux problème qu'elle pose dans différents domaines. Il était important, à cet égard, de bien dresser le cadre du présent Colloque, ce que le professeur Thürer a remarquablement fait, en identifiant les problèmes de fond, mais aussi les problèmes, si importants, d'interprétation.

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Le premier d'entre eux reste de définir l'occupation, son commencement, sa fin. D'où l'importance du thème du premier panel, soit précisément la définition du début et de la fin de l'occupation.

Le droit n'est pas un jeu abstrait. Il implique des responsabilités et c'est bien le principe d'effectivité qui doit nous guider quand il s'agit de les établir. Il n'y a pas de " vacuum " dans le droit et l'on ne saurait se rejeter sans cesse la responsabilité. Déterminer qui exerce le " contrôle effectif " sur un territoire, élément essentiel pour l'occupation, reste toutefois une tâche ardue. Et cela d'autant plus quand l'occupation est le fait d'une coalition dont les membres se sont répartis les tâches.

Il est par ailleurs parfois tout aussi ardu de déterminer la fin d'une occupation, le critère du contrôle effectif restant là aussi déterminant. C'est d'autant plus délicat quand, comme on l'a vu en Irak, la fin de l'occupation ne signifie pas pour autant la fin du conflit. Le droit international humanitaire continue donc de s'appliquer, même si le droit de l'occupation n'est, lui, plus applicable. Et quand il s'agit de mettre en place des autorités de transition qui doivent reconstruire les institutions et préparer des élections tout en assurant la gestion du territoire, il faut pouvoir s'appuyer sur des critères clairs, qui permettent de déterminer la capacité et la véritable indépendance de la nouvelle autorité. On a vu en effet souvent dans le passé la mise en place par une puissance occupante d'autorités totalement asservies à l'occupant, dont l'indépendance était fictive. Dans le contexte actuel, il ne saurait y avoir de légitimité d'une telle autorité sans une reconnaissance de celle-ci par l'ONU.

Quand la fin de l'occupation ne signifie pas la fin de la guerre, que les hostilités se poursuivent donc et que l'ancienne Puissance occupante conserve des troupes, il faut par ailleurs rester très vigilant en ce qui concerne les responsabilités. Si la responsabilité générale de la gestion passe à la nouvelle autorité, il faut toutefois examiner le rôle effectif encore joué par les forces armées d'autres pays, en fonction, de nouveau, du principe d'effectivité. Par ailleurs, l'un des critères d'indépendance de la nouvelle autorité doit être le droit dont elle dispose de décider : de l'étendue de la collaboration des forces armées étrangères ; de l'importance et du rôle de ces forces ; et, finalement, de la date de leur départ.

Si l'on ne peut pas exclure certaines restrictions à cette autonomie de la nouvelle autorité, ce n'est en tout cas pas aux seuls Etats dont dépendent ces forces qu'il

appartient de les déterminer, mais au Conseil de sécurité de l'ONU, qui devrait les justifier pas des motifs liés à la sécurité internationale.

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La relation, en cas d'occupation, entre le droit international humanitaire *stricto sensu* et le droit des droits de l'Homme méritait par ailleurs certains éclaircissements. Je me contenterai à nouveau ici de mentionner quelques points du riche débat qui a eu lieu à ce sujet.

Il faut tout d'abord relever que la période de forte tension que l'on a pu percevoir entre ces deux corps de droit semble bien révolue. Sur le plan historique, rappelons que c'est surtout au niveau institutionnel que cette tension s'est manifestée, tant sur le plan de l'application du droit que de son élaboration.

Il y avait, notamment chez les Puissances militaires, en particulier en Amérique latine, une répulsion pour les droits de l'Homme mais une certaine acceptation du droit international humanitaire, si bien qu'une Institution comme le CICR a pu exercer au nom du droit international humanitaire une action humanitaire non négligeable, alors que l'invocation des droits de l'Homme fermait automatiquement toutes les portes. Pour des raisons pratiques, il s'agissait alors d'insister sur la différence entre les deux corps de droit et n'invoquer que le droit international humanitaire et ses principes, même dans les cas de troubles ou tensions internes où ce droit n'était pas formellement applicable.

Sur le plan de l'élaboration du droit, il s'agissait plus d'une querelle d'écoles. Si, dans l'histoire moderne du droit international, soit depuis l'élaboration de conventions internationales à vocation universelle, le droit international humanitaire a précédé les droits de l'Homme - dont les grands textes internationaux, à commencer par la Déclaration universelle, n'ont été élaborés qu'après la seconde guerre mondiale -, on ne peut pas nier toutefois la portée plus large des droits de l'Homme, qui ont vocation de s'appliquer en tout temps et en tout lieu. Pour cette raison, un fort courant s'est dessiné pour englober le droit international humanitaire dans les droits de l'Homme. L'on a alors préféré l'expression droits de l'Homme en période de conflits armés à celle de droit international humanitaire, notamment dans le cadre de la Conférence organisée par l'ONU à Téhéran en 1968.

C'était aller vite en besogne : si les instruments des droits de l'Homme continuent certes de s'appliquer en temps de conflit armé, ils peuvent en effet subir des dérogations importantes durant ces périodes. Alors que le droit international humanitaire, à l'exception de quelques dispositions qui s'appliquent également en temps de paix, est conçu pour les conflits armés. Autrement dit, la plante des droits de l'Homme se fane quand celle du droit international humanitaire s'épanouit. Englober le tout dans un corps de droit aurait donc été un exercice fort complexe.

Mais l'enjeu de ce débat, comme on l'a rappelé ci-dessus, était avant tout institutionnel. Le mode d'élaboration du droit international humanitaire repose sur une tradition qui date de la toute première Convention de Genève, adoptée en 1864. Les principales Conventions de droit international humanitaire ont été élaborées ou modifiées par des Conférences diplomatiques convoquées par le dépositaire des Conventions de Genève, le Gouvernement suisse, et elles ont été préparée par des Conférences d'experts non gouvernementaux, puis gouvernementaux, organisées par le Comité international de la Croix-Rouge, sur la base des expériences pratiques faites par celui-ci sur le terrain des conflits.

Cette manière de faire est évidemment peu orthodoxe et elle n'entre pas dans la logique actuelle du système international. Elle repose sur la tradition et son maintien ne se justifie que par le succès de la formule et son efficacité. Le maintien de celle-ci dérangeait toutefois des esprits qui souhaitaient faire rentrer l'élaboration du droit international humanitaire dans la logique de l'ordre international instauré par l'ONU.

Les tenants de cette ligne n'étaient toutefois pas tous seulement mus par des soucis cartésiens. Il y avait aussi, en arrière - fond, un désir de mieux contrôler, dans un cadre onusien, l'ensemble des processus d'élaboration et de révision du droit international humanitaire. Et c'est précisément pour cette raison, une politisation excessive - le dernier mot revient de toute manière aux Etats qui, finalement, adoptent, amendent ou rejettent les textes conventionnels qui leur sont proposés - que d'autres ont défendu, avec succès finalement, le maintien du *statu quo* en ce qui concerne le mode d'élaboration du droit international humanitaire, privilégiant une approche pragmatique qui avait fait ses preuves de préférence à une logique dogmatique.

Ces querelles ou divergences sont aujourd'hui, je crois pouvoir le dire, largement dépassées. Personne ne prétend que le droit international humanitaire se

substitue aux droits de l'Homme en période de conflit armé, et l'on ne nie pas pour autant la prééminence de ce droit dans ces périodes. Au niveau institutionnel, si les organes de contrôle du droit international humanitaire fonctionnent exclusivement lors des situations de conflits armés (à la faible exception des mesures qui doivent être prises en temps de paix déjà), personne, à de rares exceptions près, ne nie plus aujourd'hui que les organes des droits de l'Homme sont compétents en tout temps, y compris lors des périodes de conflit armé.

Une harmonie plus grande s'est donc instaurée en ce qui concerne la cohabitation des corps de droit et le fonctionnement institutionnel. Cela ne signifie pas pour autant que la relation entre le droit international humanitaire et les droits de l'Homme ne pose aucun problème : des questions délicates subsistent, qu'il convient d'aborder en toute transparence.

Il est admis qu'en cas de contradiction apparente entre les droits de l'Homme et le droit international humanitaire, ce dernier joue le rôle d'une *lex spécialis*, dont l'interprétation s'impose. C'est notamment le cas dans l'interprétation à donner du droit à la vie.

La question est toutefois plus complexe qu'il n'y paraît. D'une part il peut y avoir des hésitations sur l'applicabilité du droit international humanitaire : la frontière entre un conflit armé (dans lequel le droit international humanitaire est applicable) et des troubles intérieurs (lors desquelles il ne l'est pas) n'est pas toujours facile à tracer. D'autre part, toutes les personnes qui vivent dans un territoire en proie à un conflit armés ne sont pas couvertes par le droit international humanitaire. Si celui-ci a introduit une protection minimale étendue (cf. l'article 75 du Protocole I de 1977) pour toutes les personnes qui n'ont pas un statut spécifique de personne protégée, dans les conflits armés internationaux, cette protection ne couvre toutefois ces personnes que si elles sont " affectées " par une situation de conflit armé. Autrement dit, les criminels de droit commun dont le crime n'a aucun lien avec le conflit armé sont laissés, au niveau du droit international, sous la seule protection des droits de l'Homme en ce qui concerne le mode de leur capture, leur interrogatoire, leur détention, les garanties de traitement et les garanties judiciaires dont ils doivent bénéficier.

Il convient par ailleurs de garder un autre élément à l'esprit dans cette relation complexe entre le droit international humanitaire et les droits de l'homme. Si le droit international humanitaire fonctionne comme lex specialis par rapport aux

droit de l'Homme en période de conflit armé, on vient de le voir, cela n'empêche pas les droits de l'Homme d'apporter un éclairage ou un complément déterminant au droit international humanitaire quand celui-ci manque de clarté ou de précision. C'est notamment le cas dans le domaine des garanties minimales de traitement ou dans le domaine judiciaire.

En ce qui concerne plus particulièrement l'occupation, la question de l'applicabilité peut se poser quand des forces armées pénètrent dans un territoire étranger. Y a-t-il accord de l'Etat dans le territoire duquel ces forces pénètrent ? Si c'est le cas, la mission de ces forces étrangères est-elle de nature policière, telle une aide à rétablir l'ordre, ou constitue-t-elle une intervention au côté du Gouvernement dans le cadre d'un conflit armé non international en cours ? Si l'intervention ne repose pas sur l'accord préalable du Gouvernement de l'Etat concerné, y a-t-il véritablement occupation ? De la réponse à ces questions dépend l'applicabilité de différentes normes juridiques.

Mais la question peut aussi se poser au cours d'une occupation. Il peut y avoir dans le cadre de territoires occupés des troubles qui ne peuvent être simplement assimilés à des actes d'hostilité. Leur répression, ou la contribution à leur répression de la part de la Puissance occupante (dans la mesure où les forces de polices locales continuent de fonctionner) ne saurait donc pas, dans ces cas, s'appuyer sur les critères permissifs du droit international humanitaire en ce qui concerne l'usage de la force, mais s'inscrire dans le cadre des normes concernant l'usage de la force par la police dans des situations similaires, de " law enforcement ", en temps de paix.

Un point tout à fait essentiel qui a été souligné, est que les normes minimales des droits de l'Homme en ce qui concerne les garanties de traitement et les garanties judiciaires des personnes détenues sont applicables en tout temps et en tout lieu. Le droit international humanitaire a d'ailleurs largement repris ces normes pour les personnes qu'il couvre et il n'existe aucun " vide juridique ". Il peut y avoir application conjointe des deux corps de droit, mais on ne saurait utiliser des arguties juridiques sur l'applicabilité pour dénier toute protection à certaines personnes.

La responsabilité de l'occupant quant au respect des droits économiques, sociaux et culturels est par ailleurs un sujet qui mérite aussi approfondissement. On sait la difficulté que rencontre l'application de ces droits dans le monde en général, et on ne saurait donc pas fixer très rapidement des exigences trop

hautes à une puissance occupante. Deux éléments ont toutefois été à juste titre soulignés : la Puissance occupante ne saurait faire obstacle au développement de ces droits, notamment en s'opposant arbitrairement à des actions de développement propres à les faire progresser ; et elle est liée par le principe d'impartialité dans sa propre action pour développer ces droits : elle ne saurait faire de discrimination sur la base de critères de type ethnique, racial ou religieux, ni d'ailleurs sur celui de la soumission à l'occupant.

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Le rôle d'un occupant est large et complexe.

Large, puisqu'il s'agit de gérer le territoire, de remplir toutes les fonctions traditionnelles d'une puissance publique, à commencer par celle d'assurer la sécurité des populations. Cette fonction comprend la responsabilité de faire en sorte que, en tout état de cause, la population dispose pour le moins des biens indispensables (nourriture, soins, vêtements, logement) et elle implique en outre de rétablir, maintenir ou même progressivement renforcer le système de santé, l'éducation, le fonctionnement des institutions... L'état préexistant insuffisant des structures médicales ou dans le domaine de l'éducation, par exemple, ne saurait être une excuse pour l'occupant à cet égard. Certes, on ne peut exiger de lui d'installer du jour au lendemain les installations les plus modernes, mais il lui est demandé un effort en vue d'élever l'état général du territoire occupé à un niveau acceptable.

Le droit ne donne évidemment pas d'indications précises à cet égard mais l'on peut dire que, dans la durée, il s'agit de traiter les personnes habitant le territoire occupé comme l'on traiterait les siennes propres. Dans le cadre particulier d'une occupation qui ne vise qu'à remettre dès que possible de nouvelles autorités en place, il s'agit pour le moins de parer au plus urgent, notamment dans les domaines essentiels de la sécurité, de la santé, de l'alimentation et du logement.

Le rôle de l'occupant est aussi particulièrement complexe car l'accomplissement de cette large tâche se heurte à un autre défi majeur, celui de respecter la culture et les traditions locales, soit, d'une manière générale, de " préserver le droit du peuple ". Le droit international humanitaire insiste beaucoup sur cet aspect, notamment après ce qui s'est passé lors de la deuxième guerre mondiale, avec l'idée que l'occupation n'est qu'une période de transition.

Cette obligation se heurte toutefois elle-même à certaines limites si le droit ou les traditions locales prévalant à l'occupation sont contraires à des normes de jus cogens, notamment en matière de respect du droit des peuples à disposer d'eux-mêmes et de droits de l'Homme. Cela est tout particulièrement vrai après une dictature ou d'autres régimes peu respectueux des droits de l'Homme.

L'étendue du droit de transformer des institutions et des lois contraires aux droits de l'Homme reste toutefois un problème délicat, la frontière entre le respect de la culture et celui des droits de l'Homme, quand il y a contradiction entre les deux, n'étant pas toujours facile à tracer. On pensera notamment à certains préceptes religieux qui pourraient apparaître discriminatoire à l'égard des femmes et contraire aux droits de l'Homme, ou à l'exigence de démocratie, qui est encore très flexible dans les différentes régions du monde.

La niveau de cette exigence dépend pour beaucoup de la large acceptation de certaines exigences sur le plan universel, et du niveau de ce qui est exigible en termes de respect des droits de l'Homme en temps de paix car l'on doit être conscient que l'universalité des droits de l'Homme, si elle est une réalité pour certains d'entre eux, n'est encore qu'un voeu pieux pour nombre d'autres. On ne peut donc aller trop loin en territoires occupés, un certain parallélisme devant être fait entre l'acceptation de transformation sociale et culturelle dans le droit et les institutions du territoire occupé en vue d'une meilleure conformité de celles-ci aux droits de l'Homme avec l'état des lieux général, soit les minimaux exigibles - et réellement exigés - par la communauté internationale de la part de l'ensemble des Etats en ce qui concerne le respect des droits de l'Homme en temps de paix. Le combat et les progrès obtenus pour ceux-ci permettront également d'aller plus loin dans les transformations que l'occupant pourra, voire devra, légitimement imposer dans le territoire occupé au nom des droits de l'Homme.

Mais il est un autre facteur qui est important à cet égard, c'est celui de la légitimité de l'occupation. Il est clair que si l'occupation est temporaire et qu'elle est autorisée, puis soumise au contrôle régulier de l'ONU, en particulier du Conseil de sécurité, la marge de manoeuvre sera plus grande que si l'occupation résulte d'un coup de force effectué sans autorisation de l'ONU, d'autant plus si l'objectif et le caractère temporaire de l'occupation ne sont pas clairement établis.

Dans le premier cas, les transformations reçoivent en quelque sorte l'aval de l'ONU. Certes, la marge de manoeuvre n'est pas très grande dans la mesure où les Etats, y compris des membres permanents du Conseil de sécurité ne souhaitent pas voir imposées des exigences qu'ils ne remplissent pas eux-mêmes et que la crainte de précédents qui pourraient entamer le respect de la souveraineté nationale reste très répandue.

Mais la méfiance à l'égard de toute transformation sera encore beaucoup plus grande dans le second cas, attisée par la crainte que toute transformation ne trouve sa véritable motivation dans les objectifs politiques, voire les visées annexionnistes de l'occupant et non pas dans le souci d'améliorer le respect des droits de l'Homme.

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La relation entre civils et militaires dans le cadre d'un régime d'occupation est également, on l'a bien vu lors de la récente occupation de l'Irak par les Etats-Unis et ses alliés, une question très actuelle. C'est en particulier le développement de la privatisation de certaines des tâches dévolues à l'occupant qui mérite une attention soutenue.

La tendance à privatiser toujours davantage certaines tâches qui relèvent traditionnellement de la puissance publique pose, sur un plan général, de nombreuses questions politiques et juridiques, qui dépassent évidemment le cadre du présent Colloque. Dans le cadre de celui-ci, soit du droit de l'occupation, les soucis principaux qui se manifestent sont celui d'une confusion quant au droit applicable aux acteurs privés et, surtout, celui d'une dilution des responsabilités.

Pour le premier, il s'agit de savoir si certains acteurs privés peuvent et doivent être considérés comme des combattants et se voir attribuer le statut de prisonnier de guerre en cas de capture. Cela n'est pas exclu pour autant qu'ils dépendent clairement du commandement des forces armées et qu'ils n'aient donc guère d'autonomie décisionnelle. Mais c'est là qu'intervient la difficulté, ce lien n'étant pas toujours parfaitement clair et certaines compagnies privées prenant des initiatives, notamment quand il s'agit d'aller récupérer leurs membres.

Le cas des compagnies de sécurité dont les membres peuvent être amenés à utiliser leurs armes pour défendre les personnes ou les lieux dont elles ont la charge et dont le mandat peut émaner d'entités privées - notamment de grandes compagnies - mérite aussi approfondissement. Ce type de mandat, fréquemment donné en temps de paix, pose des problèmes particuliers en situation de conflit armé, la défense de certaines personnes ou biens pouvant amener ceux qui en ont la charge à véritablement s'engager dans les hostilités.

En ce qui concerne les responsabilités, il importe par ailleurs de réaffirmer sans ambiguïté que la puissance occupante ne saurait sans autre se décharger de celles qu'elle assume. C'est notamment le cas des tâches de sécurité, ou de la gestion des personnes détenues (prisonniers de guerre ou internés civils). Elle reste en tout état de cause responsable (dans les sens anglais de " accountable ") des actions commises par les compagnies de sécurité privées auxquelles elle pourrait avoir à déléguer certaines de ces tâches.

Autre est la question de la responsabilité pénale individuelle, pour laquelle il faut évidemment examiner chaque situation et la chaîne de commandement pour déterminer, au-delà de la responsabilité directe de ceux qui commettent des exactions, la responsabilité des différents échelons qui ont couverts ou tolérés de telles exactions, voire qui n'ont simplement pas rempli leur devoir de vigilance. La question est souvent d'autant plus complexe que plusieurs compagnies peuvent se trouver impliquées, certains mandats généraux donnés par la Puissance occupante étant ensuite sous-traités à d'autres compagnies. Ce qui doit être rappelé très clairement, sur ce plan aussi, c'est que le devoir de vigilance est évidemment très élevé pour les responsables de la Puissance occupante qui délèguent certaines tâches qui sont de la responsabilité de celle-ci.

Il reste - cela est clairement ressorti des débats du colloque - que les questions liées à l'apparition toujours plus étendue de compagnies privées dans le cadre des conflits armés méritent d'être approfondies et devra donner lieu à d'indispensables éclaircissement au cours de ces prochaines années, sinon à de nouvelles réglementations.

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En ce qui concerne, enfin, la question très actuelle des territoires administrés par l'ONU, le débat a également été très riche. Les situations en ex-Yougoslavie (Kosovo) et au Timor ont amené l'ONU à prendre la responsabilité provisoire de territoires et l'on ne peut pas exclure que de telles situations se répètent ailleurs dans le monde. On se rend toutefois compte que chaque situation a ses spécificités.

Je retiendrai de ce débat surtout que de telles situations n'entrent pas parfaitement dans une catégorie juridique bien définie. Certes, le droit de l'occupation donne des indications utiles et certaines de ses dispositions sont tout à fait pertinentes dans ce type de situation. C'est notamment le cas de l'obligation de respecter et protéger l'intégrité et la dignité de tout habitant des territoires et d'assurer le fonctionnement des institutions. Dans ces domaines, l'ONU se devrait d'être exemplaire et le caractère particulier de ses mandats ne saurait l'exonérer de telles obligations, bien au contraire.

Mais le droit de l'occupation tend à protéger le patrimoine et la culture des territoires occupés contre d'éventuelles visées annexionnistes de l'occupant alors que ce souci n'a pas à être pris en considération quand c'est l'ONU elle-même qui administre un territoire. Dans le même sens, on devrait admettre pour l'ONU une souplesse plus grande en ce qui concerne des réformes qui apparaissent nécessaires, d'autant plus quand le territoire était précisément soumis à un régime qui ne correspondait pas à la culture de ses habitants.

Faut-il dès lors de nouvelles normes juridiques? Ce n'est pas évident, du fait précisément de la diversité des situations. En revanche, il est apparu essentiel que les mandats donnés soient parfaitement clairs et précis, avec des “rules of engagement” qui ne laissent rien au hasard.

La question du contrôle a elle aussi été évoquée et il est apparu très important, pour la crédibilité des autorités d'administration comme de l'ONU en général que l'on ne s'abrite pas derrière les immunités pour échapper au contrôle. La pratique a démontré que les fonctionnaires de l'ONU dans de telles situations, en dépit de la qualité et de l'engagement remarquables de nombre d'entre eux, n'avaient de loin pas toujours tous des comportements exemplaires. Outre la sélection et la formation de ces fonctionnaires, cette réalité renforce l'importance, dans ces situations cruciales, de mettre un système de contrôle efficace et indépendant.

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Ce sont, chers amis, les quelques remarques qui me sont venues à l'esprit après ces deux jours de débats très riches et très intenses sur les défis actuels du droit de l'occupation. A ces remarques, permettez-moi d'ajouter une réflexion supplémentaire que m'inspire ce que nous a dit Gert-Jan van Hegelsom sur "le strange animal" qu'est l'Union européenne et sur le rôle qu'elle pourrait ou devrait jouer. Je suis personnellement convaincu que l'Union européenne peut et doit avoir l'ambition d'être un modèle, de montrer la voie. Et s'il est un endroit où je souhaite le dire, c'est bien dans ce Collège d'Europe.

Dans l'ouvrage récemment publié par Sylvain Vitté, ici présent, Rober Kolb a terminé sa préface en réaffirmant : "Heureux sont les hommes de bonne volonté". Je ne doute pas, si c'est le cas, que cette salle compte beaucoup de gens heureux. Les questions que nous avons abordées sont de vraies questions, dont on ne saurait minimiser la complexité et qu'il convient de débattre d'abord entre gens de bonne volonté pour, sinon les résoudre, du moins les éclairer et faire entrevoir de possibles solutions. Les personnes soucieuses de faire progresser les dossiers humanitaires doivent se parler pour mieux se comprendre afin de former un front commun car le monde n'est pas encore, loin s'en faut hélas, peuplé que d'hommes de bonne volonté. Et ce dialogue est certainement une des vocations du Colloque de Bruges.

Je me réjouis déjà de pouvoir lire le compte-rendu de nos débats dans la publication que nos amis du Collège d'Europe et du CICR mettent toujours beaucoup de soin à produire et il me reste à remercier le Recteur du Collège d'Europe de l'hospitalité qu'il nous a si chaleureusement accordée, les organisateurs du travail parfait qu'ils ont une fois de plus accompli, les intervenant de leurs brillantes prestations, les interprètes de la qualité de la leur et, vous tous, de votre participation si attentive, constructive et active à nos débats.

J'espère vous revoir l'an prochain pour un nouveau Colloque et vous souhaite un excellent retour.

Le VIème Colloque de Bruges est clôt.

Current Challenges to the Law of Occupation

6th Bruges Colloquium

20-21 October 2005

DAY 1 : Thursday 20th October

9.00-9.45 Registration and Coffee

9.45-10.15 Welcome address by **Prof. Paul Demaret**, Rector of the College of Europe

10.15-11.00 Keynote address on the law of occupation: **Prof. Daniel Thürer**, Member of the ICRC

Topic One : Beginning and end of occupation

11.00-12.30 Panel Discussion : **Prof. Michael Bothe** (Head of Unit, Peace Research Institute, Frankfurt, Germany), **Prof. Erika de Wet** (Professor of International Constitutional Law, University of Amsterdam, The Netherlands)
Chairperson : **Prof. Heike Spieker** (German Red Cross)

12.30-14.00 Sandwich lunch

Topic Two : Applicability of human rights law in situations of occupation

14.00-15.45 Panel Discussion : **Col. John Phelps** (US Naval War College), **Mr James Ross** (Human Rights Watch), **Mr Noam Lubell**

(Senior Researcher, Human Rights Centre, University of Essex, United Kingdom)
Chairperson : **Prof. Elzbieta Mikos-Skuza** (Professor of International Law, Warsaw
University - Legal Advisor Polish Red Cross)

15.45-16.15 Coffee Break

Topic Three : To what extent does the law of occupation preclude transformational developments in occupied territories?

16.15-18.00 Panel Discussion : **Ms Lindsey Cameron** (Assistante Doctorante, University of Geneva, Switzerland), **Prof. Jorge Cardona Llorens** (Professor of International Law, Jaume I University, Castellón - Spain)
Chairperson : **Mr Laurent Colassis** (Legal Advisor, ICRC)

19.30-22.30 Dinner at the *Hof Lanchals*

DAY 2 : Friday 21st October

Topic Four : Civil military relations in situations of occupation

9.00-10.30 Panel Discussion : **Mr Manuel Bessler** (Head of Unit, UNOCHA), **Mr Sami Makki** (Senior Researcher, CIRPES, Paris, France)
Chairperson : **Ms Emanuela-Chiara Gillard**
(Legal Advisor, ICRC)

10.30-11.00 Coffee Break

Topic Five : The law applicable to multinational forces in administered territories

11.00-12.30 Panel Discussion : **Dr Sylvain Vité** (Project Manager, CUDIH, Geneva, Switzerland), **Mr Gert-Jan van Hegelsom** (Legal Advisor, General Secretariat of the Council of the EU), **Dr Marten Zwanenburg** (Legal Advisor, Directorate of Legal Affairs, Ministry of Defence, The Netherlands)
Chairperson : **Prof. Yves Sandoz** (Member of the ICRC)

Concluding remarks

12.30-13.00 Concluding remarks and closure by **Prof. Yves Sandoz** (Member of the ICRC)

Speakers' Curriculum Vitae

Le Prof. Paul Demaret est Docteur en droit et Licencié en sciences économiques de l'Université de Liège, où il a également obtenu un diplôme d'études spécialisées en droit économique. Il a ensuite poursuivi ses études aux États-Unis, et est titulaire d'un Master of Law de l'Université de Columbia et d'un Doctorat of Juridical Science de l'Université de Californie à Berkeley. Le Professeur Demaret a enseigné des matières juridiques ou économiques dans de nombreuses universités, notamment celles de Genève, Paris II, Pékin et Coimbra, ainsi qu'à l'Académie de Droit européen de Florence et au Colegio de Mexico. Il est actuellement Recteur du Collège d'Europe et professeur extraordinaire à la Faculté de droit de l'Université de Liège.
Spécialiste des aspects juridiques et économiques de l'intégration européenne, le Professeur Demaret est l'auteur ou l'éditeur d'ouvrages et de nombreux articles sur ces questions. Son expertise en matière de commerce international a été sollicitée par diverses institutions, dont l'Organisation Mondiale du Commerce, où il a servi dans deux panels.

Prof. Daniel Thürer holds a Chair of International and European Law as well as Constitutional and Comparative Constitutional Law at the University of Zurich. He received his J.D.-degree (lic.iur.) from Zurich University (1970), his LL.M. from Cambridge University (1974) and his Ph.D. (Dr.iur.) from Zurich University (1974). He was a Research Fellow at the Max Planck Institute of Public International Law and Comparative Public Law in Heidelberg from 1976 to 1979, a Visiting Scholar at the Harvard Law School from 1979 to 1981. He was Legal Advisor of a Swiss Cantonal Government from 1981 to 1983 and became Professor at the University of Zurich in 1983. Daniel Thürer is also a member of the International Committee of the Red Cross and member of the European Commission against Racism and Intolerance (ECRI). He is also member of the OSCE Court Conciliation and Arbitration.
Daniel Thürer is co-founder of the "Europa Institut Zürich" and member of the boards of editors of the "Revue de droit Suisse", "Revue Suisse de droit

international et de droit européen" et "Archiv des Völkerrechts". He widely published in the fields of International, European and Public Law.

Prof. Michael Bothe (Dr.iur) is Professor emeritus of Public Law at the J.W. Goethe University (Frankfurt/Main), Head of the research unit "International Organisation, Democratic Peace and the Rule of Law" at the Peace Research Institute Frankfurt. He is also Immediate Past President of the German Society of International Law (2001-2005) and Chair of the Advisory Commission of International Humanitarian Law (German Red Cross). He was Professor at the University of Hanover and visiting Professor at the universities of Montreal, Florida (Gainesville), Georgia State (Atlanta), Groningen and Paris II.
Michael Bothe also served in various capacities in international litigation and treaty negotiations. He is author of numerous publications on the Law of Peace and Security, and International Humanitarian Law, International Environmental Law and Comparative Constitutional Law.

Prof. Erika de Wet is Professor of International Constitutional Law at the Amsterdam Centre for International Law. She currently also holds the position of Extraordinary Professor at the Faculty of Law, North West University (Potchefstroom, South Africa) and of *Privatdozentin* at the Faculty of Law, University of Zurich (Switzerland). She completed her basic legal training (B.Iur, LL.B.) as well as her doctoral thesis (LL.D.) at the University of the Free State (South Africa). She holds an LL.M. from Harvard University and completed her *Habilitationsschrift*, at the University of Zurich, in December 2002.
Before focussing on International (institutional) Law, she specialised in Comparative Constitutional Law, with a doctoral thesis on *The Constitutional Enforceability of Economic and Social Rights: the Meaning of the German Constitutional model for South Africa* (Butterworths, South Africa, 1996). From 1991 to 1993, she was a Visiting Scholar at the Max Planck Institute for Foreign Public Law and International Law in Heidelberg (Germany). Thereafter she worked for the International Labour Office (ILO) in Geneva (Switzerland) and the Swiss Institute of Comparative Law in Lausanne (Switzerland). She also lectured at Brandeis University (USA) in the spring of 1999 and held the position of Associate Professor of the Law of International Organisations at Leiden University during 2000 and 2001.

Emanuela-Chiara Gillard is a Legal Adviser in the Legal Division of the International Committee of the Red Cross (ICRC), where she is responsible, *inter alia*, for legal issues raised by displacement, the protection of civilians, women

and children in armed conflict, occupation, multinational forces and private military and security companies. In 2003 and 2004, she spent several months in the field as legal adviser to the ICRC's operations in Iraq.
Prior to joining the ICRC in 2000, Emanuela Gillard was a Legal Adviser at the United Nations Compensation Commission, in charge of government claims for losses arising from Iraq's invasion and occupation of Kuwait. From 1995 to 1997, she was a research fellow at the Lauterpacht Research Centre for International Law at the University of Cambridge.
Emanuela Gillard is a solicitor of the Supreme Court of England and Wales and member of the Executive Council of the American Society of International Law. She holds B.A. and LL.M. degrees from the University of Cambridge.

Col. John Phelps is responsible for all criminal appeals to the Army Court of Criminal Appeals, Court of Appeal of the Armed Forces and the U.S. Supreme Court. He also gives lectures on International Law at the US Naval War College, and taught courses to military, government and civilian organisations in Argentina, Belgium, Chile, Ghana, Italy, Japan, Kenya, Switzerland and United Kingdom. He was Course Director at the International Institute of Humanitarian Law (San Remo) and Guest Lecturer for the Defense Institute for International Legal Studies.
John Phelps served as Chief Legal Advisor for the Multi-National forces in Iraq (2004-2005) and for the Allied Forces Southern Europe (NATO) in Naples (Italy) from 1999 to 2002.

James Ross has been Senior Legal Advisor at Human Rights Watch since 2000, where he works on a wide range of international human rights and humanitarian law issues. He has previously worked for Médecins sans Frontières in Holland, the OSCE in Bosnia, the International Human Rights Law Group in Cambodia, and the Lawyers Committee for Human Rights in the Philippines.

Noam Lubell is Senior Researcher at the Human Rights Centre of the University of Essex (UK). He teaches International Law of Armed Conflicts and International Human Rights Law within the Essex Law Department, and conducts IHL training programmes for human rights NGOs. He has over ten years combined experience working in human rights NGOs covering conflict, primarily within Israel and the Occupied Palestinian Territories. He holds numerous positions such as Outreach Coordinator, International Law Advisor, and Director of a Prisoners & Detainees Project.
Noam Lubell was also a military officer during a number of years. He has taught, researched and published on a variety of related topics.

Prof. Elzbieta Mikos-Skuza is a lecturer in Public International Law at the Faculty of Law of the University of Warsaw. She established also specific courses on International Humanitarian Law, on state responsibility and on case law of the International Court of Justice. For more than twenty years, she has been dedicated to the work of the Polish Red Cross as a volunteer legal adviser, president of the Polish Red Cross Commission for Dissemination of International Humanitarian Law. Since 2004, she is Vice-President of the Polish Red Cross.
Dr Mikos-Skuza is also Vice-President of the International Humanitarian Fact Finding Commission and a member of the Commission of International Humanitarian Law of the International Institute of Humanitarian Law (San Remo). She is the author of numerous publications on Public International Law and International Humanitarian Law and co-author of the collection of 73 documents on IHL, published in Polish language.

Lindsey Cameron is *Assistante Doctorante* at the International Law and International Organisations Department of the University of Geneva. Previously, she worked as Protection Officer for the UN High Commissioner for Refugees in Serbia (Belgrade and Kraljevo). She holds a Master of Arts (on Contemporary/Modern History) from the University of Toronto, a Bachelor of Laws from the McGills University (Montreal) and a Master of International Humanitarian Law from the University of Geneva.
Lindsey Cameron has co-written articles on International Humanitarian Law, together with Prof. Marco Sassòli.

Prof. Jorge Cardona Llorens est professeur de droit international public et relations internationales à l'Université Jaume I, depuis 1995, et titulaire de la chaire Jean Monet en Droit européen depuis 1996. Il est également directeur des *Cursos euromediterraneos Bancaja de derecho internacional* et dirige la section de droit international du Centre International Bancaja pour la paix et le développement, récompensé par l'UNESCO (médaille d'or Mahatma Ghandi pour la Paix). Jorge Cardona Llorens est également Président de l'Institut méditerranéen d'études européennes, Président du Conseil de Valencia pour le débat sur le future de l'Europe et membre de la Commission de Valencia d'accréditation et d'évaluation de la qualité des universités. Il fut également membre du Comité des Notables nommés par la Cour Interaméricaine des droits de l'Homme pour étudier la réforme du système interaméricain des droits de l'Homme. Le Professeur Cardona Llorens a également enseigné dans de nombreuses universités comme celles de Paris I et Paris II, Cergy-Pontoise, Aix-en-Provence et Buenos Aires.

Finalement, le Professeur Cardona Llorens est également membre de plusieurs associations, parmi lesquelles *l'Association Española de Profesores de Derecho Internacional y Relaciones Internacionales, l'International Law Association*, l'Association française de droit international et la *European Society of International Law.*

Manuel Bessler is Chief of the Promotion of the Humanitarian Agenda Unit in the Office for the Coordination of Humanitarian Affairs of the United Nations (OCHA) in New York. Between 1991 and 1999, he worked for the International Committee of the Red Cross (ICRC) in different field missions, including as Legal Advisor and Head of sub-Delegation in Israel and the Occupied Palestinian Territories, liaison and information delegate in Haiti. He was also Head of Mission in Chechnya and in Iraq. Before his work with the ICRC, Manuel Bessler practised law in Zurich. He holds degrees from the University of Zurich and Harvard Law School.

Sami Makki is researcher and lecturer on Peace and Strategic Studies at the *Ecole des hautes études en sciences sociales* (EHESS) in Paris. He also lectures on defence and security studies at the University La Sorbonne and Sciences Po. His main areas of research are civil-military relations, US-UK military strategies, European and transatlantic issues and non-state actors in the contemporary world. Sami Makki has an academic background in History and Sociology.
Sami Makki has also published two books, and a third on "Private military companies and the transformation of war" is due to be published early next year.

Prof. Heike Spieker, (Dr. iur. 1992) is Head of the International Law and International Institutions Department of the German Red Cross Headquarters and lecturer at the Ruhr-Universität of Bochum (Germany) and the University College Dublin (Ireland). She was Chair of Public Law and International Law at the Ruhr-Universität, from 1994 to 1996, and Assistant Professor at the Institute for International Law of Peace and Armed Conflict (IFHV), from 1996 to 2000. She was also in charge of numerous teaching programmes related to humanitarian issues (NOHA, PIBOES, etc).
Heike Spieker's special fields of research and interest are International Humanitarian Law, legal regime of humanitarian action, protection of cultural property, non-international armed conflicts as well as implementation and enforcement mechanisms.

Dr Sylvain Vité is Deputy Co-ordinator at the International Reference Centre for the Rights of Children deprived of their Family (ISS/IRC). He was previously consultant on International Humanitarian Law, Human Rights and International Criminal Law for different associations. He worked as project Manager and Lecturer on International Humanitarian Law at the University of Geneva, as well as Programme Officer and Legal Advisor for the World Organisation against Torture. He also was Delegate for the ICRC in Peru and Colombia.
Sylvain Vité is also author of numerous publications and articles on International Humanitarian Law.

Mr Gert-Jan van Hegelsom has joined the General Secretariat of the Council of the European Union as a legal advisor, working on issues relevant for the European Security and Defense Policy. Prior to this position, he was the Head of the International and Legal Policy Affairs Department of the Directorate of Legal Affairs of the Dutch Ministry of Defense. He has worked for the Dutch Ministry of Defense since 1981 in different capacities.
Gert-Jan van Hegelsom has also pursued an academic career. He has, inter alia, taught at the Royal Netherlands Naval War College and at the *Institut du Droit de la Paix et du Développement* of the University of Nice-Sophia Antipolis. He is the author of numerous publications in international law.

Dr Marten Zwanenburg is Legal Counsel at the International and Legal Policy Affairs Department of the Dutch Ministry of Defence (since 2002), and Secretary of the Working Group on the Law of International Organisations (Netherlands Society for International Law, since 2001). He was a lecturer on Public International Law at the University of Amsterdam. He was also Legal Counsel at the International Law Department of the Dutch Ministry of Foreign Affairs, from 2001 to 2002, and consultant to the UN Commission of Inquiry for the Occupied Palestinian territories.
Martin Zwanenburg worked also for the OSCE as supervisor of the elections in Bosnia-Herzegovina and for the Office of the High Commissioner for Human Rights.

Le Prof. Yves Sandoz est docteur en droit de l'Université de Neuchâtel. Délégué du Comité international de la Croix-Rouge (CICR) entre 1968 et 1973, il a effectué des missions sur le terrain, notamment au Nigéria, en Israël et dans les territoires occupés, au Bangladesh et au Yémen. Attaché au siège du CICR de 1975 à 2000, il a occupé pendant 18 ans la fonction du Directeur du droit international et de la doctrine. Il a également été, pendant douze ans, membre

de la Commission permanente de la Croix-Rouge et du Croissant-Rouge et Président de la Commission académique de l'Institut International de Droit Humanitaire (San Remo).
Ayant achevé son parcours professionnel au CICR, Yves Sandoz a été élu membre de l'Institution dès novembre 2002 et membre de l'Institut International de Droit de l'Homme en 2003. Il est l'auteur d'une centaine de publications et enseigne aujourd'hui le droit international humanitaire aux Universités de Genève et Fribourg.

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